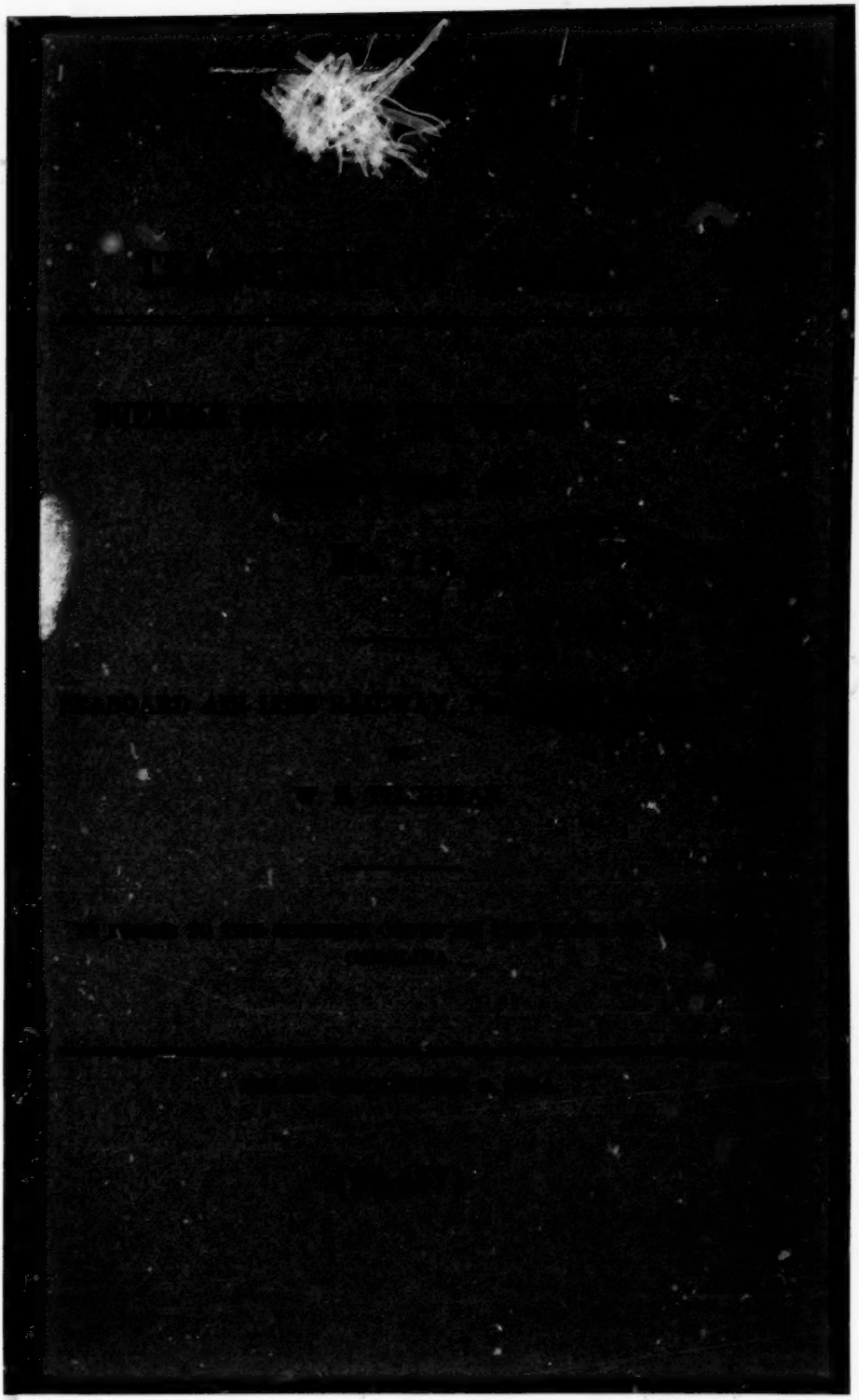

(24,457)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 713.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

W. B. TILGHMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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1 In the Supreme Court of North Carolina, August Term, 1914.

No. 255.

W. B. TILGHMAN,
vs.
SEABOARD AIR LINE RAILWAY.

Petition for Writ of Error.

To the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina:

Your petitioner, Seaboard Air Line Railway, a corporation of the State of Virginia, North Carolina and other states, respectfully shows:

This was a suit brought by W. D. Tilghman, an employee of the Seaboard Air Line Railway, to recover damages for personal injury under the Federal Employers' Liability Act, enacted by Congress of the United States, April 22nd, 1908, and the amendments thereto.

At the trial in the Superior Court of Wake County, issues were submitted to the jury and answered as follows:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint and amendment thereto?

Answer: "Yes."

2. Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

Answer: "Yes."

3. What damages is the plaintiff entitled to recover?

Answer: "$7,000.00."

From the judgment rendered upon said verdict in favor of the plaintiff for the sum of $7,000.00 and the costs of the action, defendant appealed to the Supreme Court of North Carolina:

That the Supreme Court of North Carolina, which is the highest Court in the State of North Carolina, in which a decision in the said action could be had, at the August Term, 1914, of said Court,

2 to-wit, on the 5th day of November, 1914, rendered judgment adverse to this petitioner, and affirming the judgment of said Superior Court of Wake County.

That in the proceedings had and judgment rendered, certain errors were committed to the prejudice of the petitioner, all of which more fully appears in the assignment of errors filed herewith.

That the cause of action set forth in the complaint and defense thereto set up in the answer of the plaintiff in error, arose under the statutes of the United States, to-wit the act regulating, governing and controlling the liability of a railroad engaged in interstate commerce to an employee who receives an injury or is killed while

employed in such commerce, approved by Congress, April 22d, 1908, and usually referred to as the Federal Employers' Liability Act.

That the errors complained of in this petition, and more fully set forth in the assignment of errors accompanying this petition, are, that the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner under the Federal Employers' Liability Act in that instructions to the jury were given which were objected to by your petitioner, which denied your petitioner the construction of said act to which it was entitled and instructions requested by your petitioner were refused, which denied your petitioner the construction of said act, to which it was entitled and your petitioner was in other ways in the trial of said action deprived of its rights under said Federal Employers' Liability Act, as more fully appears in the assignment of errors filed herewith.

Therefore, considering itself aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in the above entitled case, your petitioner hereby prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correction of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenti-
3 cated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States, and that the decision and judgment of the Supreme Court of North Carolina may be reversed and annulled.

Assignment of Errors herewith filed.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN,
Attorney for Seaboard Air Line Railway.

STATE OF NORTH CAROLINA, *ss:*

Let the writ of error issue upon the execution of a bond by the Seaboard Air Line Railway in the sum of Eleven Thousand Dollars; such bond when approved to act as a supersedeas. Dated November 17, 1914.

[s.] WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

4 In the Supreme Court of North Carolina, Fall Term, 1914.

No. 255.

W. B. TILGHMAN
VS.
SEABOARD AIR LINE RAILWAY.

Assignment of Errors and Prayer for Reversal.

This is an action brought by W. B. Tilghman against Seaboard Air Line Railway to recover damages for personal injury received

in a head-on collision on the line of railroad of the Seaboard Air Line Railway, while he was employed on one of the passenger trains of said Railway as a conductor. It was alleged in the complaint and admitted by the defendant that at the time of said collision and injury to the plaintiff, both the defendant and plaintiff were engaged in interstate commerce, and plaintiff brought his action specifically under the Employers' Liability Act, passed and approved by the Congress of the United States, on the 22d day of April, 1908, and the amendments thereto. The evidence also established facts sufficient to bring the action within the provisions of said Act.

Now comes the Seaboard Air Line Railway, plaintiff in error, and files herewith its petition for writ of error and says that there are errors in the record and proceedings in the above entitled cause, and, for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignments of error:

5 1. For that the Supreme Court of North Carolina erred in its construction of the Federal Employers' Liability Act, a statute of the United States, approved by Congress on the 22d day of April, 1908, especially in the construction of Sections 1, 3, 4, and 5.

2. For that by these errors the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner under the said statute and denied to your petitioner a correct construction, interpretation, and application of the provisions of said statute.

3. For that the Supreme Court of North Carolina committed error in sustaining the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the Federal Employers' Liability Act, approved by Congress, April 22d, 1908, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action.

4. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved April 22d, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of plaintiff in error by an erroneous construction of Section 1 of said Act, thereby denying to Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and specially set up in this proceeding.

6 5. For that the Supreme Court of North Carolina erred, and its decision was against the rights set up and claimed by your petitioner under Section 1 of the said act of Congress, because of the holdings of the Supreme Court of North Carolina in

construing certain instructions given and refused upon the first issue submitted to the jury, to-wit: Was the plaintiff injured by the negligence of the defendant as alleged in the complaint and the amendment thereto, which said errors are more particularly set forth as follows:

6. For that the Supreme Court of North Carolina erred in overruling the 61st exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 8th request, to charge the jury as follows:

"Upon the plaintiff's own evidence the Court instructs you that if you find that he received an order for train No. 84 to meet train No. 81 at Grandy and that the order was of such a doubtful character that it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was and if he had done so the collision would have been prevented, then his failure to stop at Granite was negligence on his part and if you find that it was the sole proximate cause of the injury you will answer the issue of negligence "No."

7. For that the Supreme Court of North Carolina erred in overruling the 62d exception of the plaintiff in error and in holding that the trial court committed no error in modifying plaintiff in error's 9th request, to charge the jury as follows:

"Before you can answer the issue of negligence in ordering train No. 84 to meet train No. 81 at Grandy the plaintiff must satisfy you by the preponderance of the evidence that the order delivered by the operator at Norlina to the plaintiff Tilghman read as the meeting place 'Grandy,' and if the plaintiff has failed to
7 show by a preponderance of the evidence that his order was to meet at 'Grandy,' you will answer the issue of negligence in favor of the defendant 'No.'"

The Court modified this instruction by adding after the word "Grandy" in line five, the following: "or was so negligently written that it appeared to be Grandy upon a careful reading of it."

8. For that the Supreme Court of North Carolina erred in overruling the 63rd exceptions of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 10th request to charge the jury as follows:

"The plaintiff alleges in his complaint that his train No. 84 was ordered to meet train No. 81 at Grandy and that this caused the collision. The burden to show that train No. 84 was ordered to meet No. 81 at Grandy is upon the plaintiff, and if the plaintiff has failed to satisfy you by a preponderance of the evidence that he had an order to meet train No. 81 at Grandy, you will answer the issue of negligence 'No.'"

9. For that the Supreme Court of North Carolina erred in overruling the 64th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 11th request for instruction to the jury in the language requested, and modified it by adding after the word "order" in line five, the following: "unless the order shows that a careful reading would mislead," and by adding after the word "No" at the end the

following: "as to that phase of the case." The instruction requested was as follows:

"In this action the plaintiff having alleged that he had an order for his train No. 84 to meet train No. 81 at Grandy, the burden is on the plaintiff to show this by the greater weight of the evidence and he cannot show it by satisfying you that he misread an order; but he must satisfy you by the preponderance of the evidence that the defendant negligently ordered his train to meet the train No. 81 at Grandy, and if he has failed to do so satisfy you, you will answer the issue of negligence 'No.'"

8 10. For that the Supreme Court of North Carolina erred in overruling the 66th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 13th request to charge the jury as follows:

"The Court instructs you that the mere proof of a collision in this case is not in itself sufficient to establish negligence on the part of the defendant, and unless you further find by the preponderance of the evidence that this collision was caused by the negligence of the defendant in giving the plaintiff an order for train No. 84 to meet train No. 81 at Grandy, you will answer the issue of negligence 'No.'"

11. For that the Supreme Court of North Carolina erred in overruling the 73rd exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 20th request to charge the jury as follows:

"Under the Federal Employers' Liability Act, proof of the collision in this case is not sufficient in itself to establish negligence, and the burden of proof is still upon the plaintiff to satisfy you by a preponderance of the evidence that the collision was caused by the negligence of the defendant."

12. For that the Supreme Court of North Carolina erred in overruling the 76th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 23rd request to charge the jury as follows:

"If you find from the evidence that plaintiff was given an order by the defendant's operator for train No. 84 to meet train No. 81 at Granite, you will answer the issue of negligence 'No.'"

13. For that the Supreme Court of North Carolina erred in overruling the 77th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 24th request to charge the jury as follows:

9 "If you find from the evidence that this collision was caused by the failure of the plaintiff to observe the rules of the defendant company, you will answer the issues of negligence 'No.'"

14. For that the Supreme Court of North Carolina erred in overruling the 78th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 25th request to charge the jury as follows:

"If you find from the evidence that the plaintiff was in doubt as to the meeting point of train No. 84 with train No. 81, and should

further find that defendant's rules required him, in case of doubt, to pursue the safe course, and you should find that the safe course would have been to have stopped his train at Granite, and that by stopping his train at Granite, the collision would have been prevented and the plaintiff would not have been injured, you will answer the issue of negligence 'No.'"

15. For that the Supreme Court of North Carolina erred in overruling the 79th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 26th request to charge the jury as follows:

"If you find from the evidence that the rules of the defendant required the plaintiff in case of doubt or uncertainty to take the safe course and that the safe course would have been to have stopped train No. 84 at Granite, and that by stopping at Granite, the collision would have been prevented, you will answer the issue of negligence 'No.'"

16. For that the Supreme Court of North Carolina erred in overruling the 80th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 27th request to charge the jury as follows:

"It was the duty of the plaintiff under the rules of the
10 defendant, in case of doubt or uncertainty as to the meeting point of train No. 84 with train No. 81, to have stopped his train at Granite and if you find that he was in doubt or uncertainty as to such meeting point and his failure to stop at Granite was the proximate cause of his injury, you will answer the issue of negligence 'No.'"

17. For that the Supreme Court of North Carolina erred in overruling the 82nd exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"Then there is a second allegation embraced in the amended complaint, which is similar to the first, but is to the effect that the order was so negligently written that the word appeared to be Grandy even though it might have been intended to be Granite, and that on that account, if not on the first, and on the one or the other, the negligence in either putting it Grandy, or negligently writing it so it appeared to be Grandy, the trains collided, and the plaintiff was injured."

18. For that the Supreme Court of North Carolina erred in overruling the 83rd exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"If the jury find from the evidence that the defendant negligently delivered to the plaintiff an order that his train No. 84 should meet train No. 81 at a station, Grandy, and negligently gave to the conductor of train No. 81 an order to meet train No. 84 at Granite, and that this negligence on the part of the defendant was the proximate cause of the plaintiff's injury, and is established by the greater weight of the evidence, you will answer the first issue 'Yes.'"

19. For that the Supreme Court of North Carolina erred in over-

ruling the 84th exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"In considering that first phase of it, that is, that it was
11 written Grandy, or the same principle would apply if it was so negligently written that upon a proper examination of it, and I should say that that means a careful examination of it by the conductor, under those circumstances, and it then still appearing to be Grandy, then this same instruction would apply, if the facts are established by the greater weight of the evidence, and if they are not so established by the greater weight of the evidence, then your answer to the first issue should be 'No.'"

20. For that the Supreme Court of North Carolina erred in overruling the 85th exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"That is to say, you take the evidence and weigh it in your minds, not according to the greater number of the witnesses but according to the greater weight of the evidence, its weight and force, and if the evidence shows by the greater weight that that order read Grandy, or that that order was so negligently written, so defectively written, that one in the capacity of a conductor and receiving orders of that importance, after carefully examining it, construed it reasonably to be Grandy and not Granite, and I say that if that is established by the greater weight of the evidence, you will answer it 'Yes,'" and if it is not established by the greater weight of the evidence, you will answer it 'No.'"

21. For that the Supreme Court of North Carolina erred in overruling the 88th exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"And the same as to the reading of the order by the engineer. If he read it Grandy, and you find he did, it is evidence to be considered in saying whether the injury was caused by negligence or not, and it is also evidence in saying, in passing upon the question as to whether the plaintiff negligently read the order, bearing
12 upon negligence in that respect as I have just indicated, but before you can answer the issue of negligence with reference to ordering the train 84 to meet train 81 at Grandy, the plaintiff must satisfy you by the preponderance, that is the greater weight of the evidence, that the order delivered by the operator at Norlina to the Plaintiff Tilghman read as the meeting place Grandy, or at least was so negligently written that it appeared to be Grandy upon a careful reading of the same."

22. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 3 of said Federal Employers' Liability Act approved by Congress of the United States, April 22d, 1908, because of the holdings of the Supreme Court of North Carolina in construing this act and because of certain instructions given upon the second

issue submitted to the jury, to-wit: Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

23. For that the Supreme Court of North Carolina erred in overruling the 89th exception of plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

"Now, upon the plaintiff's evidence, if you find that he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was of such a nature, of such a doubtful character that it was uncertain as to whether it was Grandy or Granite, then it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was, and if you find that to be the fact, and that if he had done so the collision would have been prevented, and that his failure to stop at Granite under the circumstances was negligence on his part, and that it was the proximate cause of the injury, you would answer the second issue, 'Yes,' if shown by the greater weight of the evidence. If you find from the evidence that the plaintiff had a doubt as to whether the order received by
13 him read Grandy or if there was reasonable grounds for him to doubt it, it was his duty to stop at the first station, unless he had found this doubt out or had reasonable grounds to find it out before leaving Norlina, in which case it was his duty to remain at Norlina until all reasonable doubt was removed. And so if you find that he had such doubt, or reasonable grounds for it, and did not pursue the safe course, and that by reason of his failure to do so the collision occurred, that that was the proximate cause of it, then you will answer the issue as to contributory negligence, 'Yes.' And you would consider all the evidence throwing any light upon that question, both the defendant's evidence, the plaintiff's evidenec, and the evidence of the baggagemaster and all the other witnesses, that throw any light upon that question."

24. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress approved April 22d, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of plaintiff in error by an erroneous construction of Section 3 of said act, thereby denying to Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and especially set up in this proceeding.

25. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 3 of said Federal Employers' Liability Act approved by Congress of the United States, April 22d, 1908, because of the holdings of the Supreme Court of North Carolina in construing said act and because of certain instructions given by the trial court and approved by said Supreme Court upon the effect of contributory negligence, upon the amount of damage to which
14 defendant in error would be entitled and upon the duty of the jury in answering the third issue to-wit: What amount of

damages is the plaintiff entitled to recover of the defendant? Which said errors are as follows:

26. For that the Supreme Court of North Carolina erred in overruling the 90th exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"Upon the third issue, what damage is the plaintiff entitled to recover, the rule is this. He would be entitled to recover, if entitled at all, for past and prospective loss resulting from the wrongful act of the defendant, including indemnity for actual expense, if there is any evidence of actual expense, incurred for medical attention, loss of time from inability to perform mental or physical labor, if there is any evidence bearing upon the inability to perform mental or physical labor, and incapacity to earn money and for actual suffering of body and mind when they are the immediate and necessary consequence of the negligent injury."

27. For that the Supreme Court of North Carolina erred in overruling the 92d exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"And now another question comes in here, which is interesting because it is of recent application in our laws. I have some times said, if the gentlemen will pardon me for saying so, that the jury have for many years been unconsciously applying it, but under this act under which this action is brought you are permitted to apply it if you find that he was guilty of contributory negligence. Ordinarily, when the jury have found that the defendant was guilty of contributory negligence, I mean where the defendant is guilty of negligence and that the plaintiff was guilty of negligence, where they answer both issues 'Yes,' then they give no damages, but under this act you are permitted to do it."

15 28. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 93rd exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury, as follows:

"If you answer the second issue 'Yes,' that is, if he was guilty of contributory negligence, and so if you should answer the two issues, 'Yes,' and come to the question damages, you would assess his reasonable damages under the rule which I have laid down, and then you would make an allowance for his own negligence, and deduct that from his damages, if you find it was less than his damages. If you found it was equivalent, that would make his damages nothing, but if you found it was less, a reasonable allowance for his own negligence was less than the amount of his own damages, you would deduct it and find the result."

29. For that reason the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 96th exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"I don't think I would put it that way, but this way. If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you would answer that 'Yes,' and if you find that the plaintiff was guilty of contributory negligence as charged, you will answer that second issue 'yes,' and then you would assess the damages that he would be entitled to, and then deduct from that whatever amount you think would be proper for the contributory negligence."

30. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 97th exception of the plaintiff in error and in holding that the trial court committed no
16 error in instructing the jury as follows:

"I perhaps did say that if you found that his contributory negligence amounted to as much as the amount of damages, that it would be nothing, but I did not put it that way—if they were equally negligent that he would be entitled to nothing. It would not be that."

31. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 98th exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"But you would deduct a reasonable amount from the damages that you think that he would be entitled to from the damages as an allowance for contributory negligence. It would be for you to say whether it is less or whether it is equal, but I did not put it just that way—that if they were equally guilty of negligence—but that you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence a reasonable amount for contributory negligence. You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages."

32. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 51st exception of plaintiff in error and in holding that the trial court committed no error in refusing to submit to the jury the following issues tendered by plaintiff in error: What is the whole amount of damages, if any, sustained by the plaintiff by reason of the negligence of the defendant? What amount, if any, shall be deducted from the
17 damages sustained by the plaintiff as the portion thereof attributable to plaintiff's own negligence?

33. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in holding that:

"This action was under the Federal statute which authorizes the jury to abate the allowance of damages in proportion to the contributory negligence, if any, of the plaintiff. We cannot concur

with the defendant's counsel that the Judge erred in telling the jury that they would 'deduct' a reasonable amount for contributory negligence, instead of saying that the damages would be 'diminished' on account of contributory negligence. This, it seems to us, is a distinction without a difference and a jury of twelve men would not know the difference between the two, if there is any beyond a metaphysical distinction. It is true the Act of Congress and the decisions of the Court use the word 'diminish,' but then one thing is deducted from another, the larger amount in diminished to that extent. His Honor went further and charged that the amount deducted must be the equivalent of contributory negligence."

34. For that the Supreme Court of North Carolina, in referring to the instructions of the trial court on the issue of damages and in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, erred in holding that:

"If there be any error, it was against the plaintiff in his Honor's intimation that if the negligence of the plaintiff was equal to the negligence of the defendant he could recover nothing, whereas in such case the plaintiff would be entitled to the full amount of damages less an allowance of one half to be deducted on account of his contributory negligence. Or, as the defendant contends, the amount of such damages sustained by the plaintiff, if any, in
18 the wreck should be 'diminished' by one half on account of the contributory negligence of the plaintiff, if it equalled the negligence of the defendant. The charge of the court on this point seems to have been partially, if not completely cured by the further instruction of the Court. Of this instruction the defendant cannot complain and the plaintiff is not appealing."

35. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by your petitioner under the Federal Employers' Liability Act, approved by Congress of the United States, April 22d, 1908.

36. For that the Supreme Court of North Carolina erred in overruling the 1st exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. Does that lessen the danger of collision?

By the COURT: I do not at present see the connection, so I will sustain the objection.

By Mr. DOUGLASS: We allege that the absence of the block system was one of the causes of the accident.

A. Very much so, and it places the responsibility on additional men other than the conductor and the engineer, and gives additional protection. For example, had the Seaboard been operating under an absolute block system, this particular district, the semaphore signal at this station Granite, would have been red, and would not have been changed to white until train No. 81 arrived. This is the protection that this train would have had under the absolute block that it did not have in the absence of it."

37. For that the Supreme Court of North Carolina erred in overruling the 2nd exception of the plaintiff in error to the admission of the answer to the foregoing question.

38. For that the Supreme Court of North Carolina erred in overruling the 3rd exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

19 "Q. Has the Seaboard Railroad, or did it at that time in its operation have any part of its system under the absolute block system?

A. I think so. Yes, I think some of the districts were working under the absolute block system. This block system was not in use at the time of this accident between Norlina and Richmond.

39. For that the Supreme Court of North Carolina erred in overruling the 6th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. As to meeting points under the absolute block system, what is the rule with respect to signals?

A. Signals at block offices remain at danger.

40. For that the Supreme Court of North Carolina erred in overruling the 9th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. Do you know whether or not that is in general and approved use on most of the railroads at the time of this collision or wreck? State whether it was.

A. It was in use on the roads I have been on. I have never been on any but the Norfolk & Western and the Seaboard.

41. For that the Supreme Court of North Carolina erred in overruling the 10th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"*A*. Do you know whether or not that is—What is the block system? Explain the block system to the jury.

A. It is a piece of track between two open telegraph offices or stations. An absolute block only one train is allowed in the block at the time.

42. For that the Supreme Court of North Carolina erred in overrulling the 11th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

20 "Q. State if in your opinion it minimizes the danger of collision.

A. Yes."

43. For that the Supreme Court of North Carolina erred in overruling the 12th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. Is it a safety appliance?

A. Yes."

44. For that the Supreme Court of North Carolina erred in overruling the 13th exception of the plaintiff in error to the admission of the deposition of Dr. B. W. Hillsman.

"At the time this deposition was offered in evidence, it was stated by plaintiff's counsel that efforts were being made to secure Dr. Hillsman's attendance in person, and that he would probably be in court as a witness on the following morning. Defendant's counsel objected to the deposition being read if Dr. Hillsman's attendance could be secured."

45. For that the Supreme Court of North Carolina erred in overruling the 14th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Defendant objected to the deposition of Dr. B. W. Hillsman, offered in evidence by the plaintiff. Counsel for defendant stated that if the depositions was read because of the witness being beyond the limits of the state and not in attendance upon the court, the defendant would then enter its objection to reading the deposition and subsequently putting Dr. Hillsman on the stand to testify in person."

46. For that the Supreme Court of North Carolina erred in overruling the 15th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. Now, doctor, from your knowledge of Captain Tilghman before and after this injury and from your actual experience and your examination and treatment of him what, in your opinion, was the cause of the appearance of the symptoms of locomotor ataxia in his case?

21 A. Well, I know of none of the usual text-book causes of locomotor-ataxia other than the injury to his nervous system, produced by this injury."

47. For that the Supreme Court of North Carolina erred in overruling the 16th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. I wish you would please describe, doctor, as best you can, what is the character of locomotor ataxia, its progress and its usual effect on the human system.

A. Locomotor ataxia commences with the signs I have just enumerated above—the Arg*la*'-Robinson pupil and the Rhomberg symptoms and the peculiar gait with shooting — in various portions of the body due to the hardening of the anterior columns of the cord. It is a progressive disease and, up to the present time, incurable. I think Captain Tilghman had been in the hospital before he complained of the deafness to which I have referred."

48. For that the Supreme Court of North Carolina erred in overruling the 25th exception of the plaintiff in error to the action of the trial court in permitting Dr. Hillsman to testify as witness for plaintiff after his deposition had been read in evidence by the plaintiff.

49. For that the Supreme Court of North Carolina erred in overruling the 26th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error as follows:

"Q. Describe what you found his condition to be?

A. I examined Captain Tilghman this morning, and found him with all the cardinal symptoms of locomotor ataxia. Argyll-Robertson pupil, Rhomburg symptoms, shooting pains, ataxic gait, a kind of the shuffling of the feet along, and analgesia loss of pain sensations in the lower limbs partially. I can take a pin and stick it up to the hub in Captain Tilghman's lower limbs and cause no

22 pain. All of the cardinal symptoms—absence of the patella reflex absolutely. I gave him the Rhomburg test. The

Rhomburg test is to put the patient's heels together, toes outward, close the eyes, and it is the swaying motion, backward and forward, and keeping the eyes closed and bring the ends of the fingers together (illustrates with arms outstretched) and touch the end of the nose, like I am able to do. In my opinion he is suffering from locomotor ataxia."

50. For that the Supreme Court of North Carolina erred in overruling the 27th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. What, in your opinion caused it?

A. In my opinion, by the process of exclusion, I believe the discase to be due to trauma. I mean by that, an injury. An injury produced, which I attended him for, on the 19th of November, 1912, following a railroad accident."

51. For that the Supreme Court of North Carolina erred in overrulling the 29th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. Since this last examination of him to-day, state what is your opinion as to his future condition as with respect to the locomotor ataxia inquired of?

A. The locomotor ataxia in his case I see no reason why it should not run the course as it does in everybody else—absolutely incurable and finally will kill him. In my opinion, in the condition I find him to be to-day, he is not able to perform the duties of a railway conductor. On January 6, 1913, he was just beginning to show the first signs of locomotor ataxia, and was in fairly good physical condition."

52. For that the Supreme Court of North Carolina erred in overruling the 33rd exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

23 "In my opinion, injury to the head will cause locomotor ataxia and for this reason; if an injury to the lumber spine, which is here (indicating) can so far affect the brain as to produce an Argyll-Robertson pupil, I do not see why an injury to the brain, producing the Argyll-Robertson pupil can not affect the lumbar spine."

53. For that the Supreme Court of North Carolina erred in overruling the 36th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

"Q. You stated that you have known him for five years before his injury. State how his appearance and physical condition now compares with his appearance and physical condition before his injury in November, 1912?

A. Before this injury Captain Tilghman was as fine a speciman of manhood as I ever saw, big, robust man, muscular, and now he is a wreck."

54. For that the Supreme Court of North Carolina erred in overruling the 37th exception of the plaintiff in error to the answer to the foregoing question.

55. For that the Supreme Court of North Carolina erred in overruling the 44th exception of the plaintiff in error to the refusal

of the trial court to admit the testimony offered by the plaintiff in error, as follows:

Q. Did you examine him for the purpose of testifying in this case?

This question was asked Dr. H. W. Glasscock, medical expert witness for plaintiff.

56. For that the Supreme Court of North Carolina erred in overruling the 45th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

Q. What does that look like to you? (Referring to framed copy of order.)

A. It can be taken for either one. (Referring to Granite and Grandy.)

57. For that the Supreme Court of North Carolina erred in overruling the 46th exception of the plaintiff in error to that portion of the testimony offered by the defendant in error, as follows:

24

Q. Was there any question in your mind about it looking like Grandy?

A. None at all.

58. For that the Supreme Court of North Carolina erred in overruling the 50th exception of the plaintiff in error to the submission of all the issues as set out in the record of this cause, as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint and the amendment thereto?

2. Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

3. What damages is the plaintiff entitled to recover of the defendant?"

59. For that the Supreme Court of North Carolina erred in overruling the 51st exception of the plaintiff in error and in holding that the trial court committed no error in refusing to submit the following issues or any of them tendered by the plaintiff in error:

"1. Was plaintiff injured by the negligent failure to have the block system, as alleged in the complaint?

2. If so, did plaintiff voluntarily assume the risk of being injured thereby?

3. Was plaintiff injured by using the telephone system to transmit orders, as alleged in the complaint?

4. Did plaintiff voluntarily assume the risk of being injured thereby?

5. Was plaintiff injured by negligence of the defendant in maintaining two stations named Grandy and Granite, as alleged in the complaint?

6. If so, did the plaintiff voluntarily assume the risk of being injured, as alleged in the answer?

7. Was the plaintiff injured by the negligence of the defendant in giving an order to train No. 81 to meet train No. 84 at

25

Granite, and giving an order to train No. 84 to meet train No. 81 at Grandy?

8. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

9. What is the whole amount of damages, if any, sustained by the plaintiff by reason of the negligence of the defendant?"

10. What amount, if any, shall be deducted from the damages sustained by the plaintiff as the portion thereof attributable to the plaintiff's own negligence?"

60. For that the Supreme Court of North Carolina erred in overruling exception 51½ of the plaintiff in error and in holding that the trial court committed no error in permitting plaintiff to withdraw from his complaint, as follows:

"The plaintiff withdraws from his complaint paragraphs A, B and C; and, under paragraph A, matter pertaining to the block system, phone system, and similarity of names of stations, and requests that the evidence bearing upon the same be withdrawn from the jury."

61. For that the Supreme Court of North Carolina erred in overruling the 52d exception of the plaintiff in error and in holding that the trial court committed no error in permitting the plaintiff at the conclusion of all the evidence to amend his complaint by adding the following paragraph 8 (F):

"In that the defendant negligently delivered to the plaintiff at Norlina, N. C., and at the said time the train order aforesaid for the meeting of his said train No. 84 with train No. 81 written in such form and manner that if the same was intended to refer to any other meeting place than 'Grandy,' nevertheless, the same was so negligently written that the word appeared to be 'Grandy;' and in that when the plaintiff read his train order to the defendant before leaving Norlina, as he did so read it aloud in a plainly audible and distinct tone of voice, 'Grandy,' the defendant negligently assented to and approved the said reading and pronunciation of the said 'Grandy;' and in that thereafter and before the plaintiff's said train reached the station, Granite, N. C., the defendant
26 negligently twice read the said train order to the plaintiff and each time read and pronounced the same in respect to the meeting place therein designated 'Grandy.'"

62. For that the Supreme Court of North Carolina erred in overruling the 53d exception of the plaintiff in error and in holding that the trial court committed no error in permitting the plaintiff to withdraw from his complaint paragraph 8 (*a*), 8 (*b*), 8 (*c*) and all matter in paragraph 8 pertaining to the block system, phone system and similarity of names of stations.

"8. That said head-on collision, wreck and injury and damage to the plaintiff was caused by the negligence of the defendant in the following particulars, to-wit:

(*a*) In that it negligently and carelessly had and maintained two stations upon its said single line of railway in close proximity with names so similar in sound and so closely resembling each other in chirography that one might very easily be mistaken for the other.

(*b*) In that it negligently and carelessly failed to have in operation upon its said line of railway from Norlina, North Carolina, to

Richmond, Virginia, a system of signals known as the 'Block System,' to control the operation and movement of its trains, which said system is a preventive of collisions and accidents and a protection to employees and passengers, and which said 'Block System' was at said time, and is now, approved and in general use by railroads.

(c) In that it negligently and carelessly operated its train 'Number 84' and 'Number 81' upon telephonic communication, depending entirely upon the proper understanding of the said train orders communicated from Richmond, Virginia, and upon the correct transcription of the said train orders by the operator and agent of the defendant at Norlina, North Carolina."

63. For that the Supreme Court of North Carolina erred in overruling exception No. 102 of the plaintiff in error and in holding that the trial court committed no error in overruling defendant's motion for judgment non obstanti ver-dicto upon the coming
27 in of the verdict.

64. For that the Supreme Court of North Carolina erred in overruling exception No. 103 of the plaintiff in error and in holding that the trial court committed no error in overruling defendant's motion to set aside the verdict, because the amount of damages awarded was excessive.

65. For that the Supreme Court of North Carolina erred in overruling exception No. 105 of the plaintiff in error and in holding that the trial court committed no error in overruling defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence and in the court's charge to the jury and in the court's refusal to give defendant's request for instructions and in permitting amendment to complaint and wthdrawal of causes of action by plaintiff at the conclusion of all the evidence.

66. For that the Supreme Court of North Carolina erred in overruling exception No. 106 of the plaintiff in error and in holding that the trial court committed no error in signing judgment in this case as follows:

"This cause coming on to be heard before his Honor O. H. Allen, Judge, and a jury, at this the May Term, 1914, of the Superior Court of Wake County, and being tried, the following issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

2. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

3. What amount of damages is the plaintiff entitled to recover of the defendant?

And the jury having answered the first issue 'Yes,' and the second issue 'Yes,' and the third issue 'Seven Thousand ($7,000) Dollars' and it appearing to the Court that this action was brought and tried under the Federal Employers' Liability Act enacted by Congress on the 22nd day of April, 1908, it is therefore,

28 Ordered, adjudged and decreed that the plaintiff, W. B. Tilghman, recover of the defendant, Seaboard Air Line Railway, the sum of seven thousand ($7,000) dollars and the costs of this action to be taxed by the clerk."

67. For that the Supreme Court of North Carolina erred in affirming the judgment of the Superior Court of Wake County, North Carolina, rendered against the plaintiff in error in the sum of $7,000.00 damages upon the verdict rendered in this action.

68. For that the Supreme Court of North Carolina erred in holding that:

"The whole case turns upon the question whether there was negligence of the defendant, or of the plaintiff, or of his fellow servants in that a train order for train #81 to meet train #84 was written to pass at 'Granite' or 'Grandy,' or by the negligence of the operator at Norlina, the word 'Granite' was so written as to be mistaken for the word 'Grandy.' By reason of this mistake, however it was caused, a head-on collision took place to the injury and damages of the plaintiff as he alleges, but which the defendant denies. These were almost entirely controversies of fact and while there were numerous exceptions as to the law, we do not perceive any errors in the conduct of the cause by the presiding Judge which entitles the defendant to a new trial. There can be no benefit derived from a more minute discussion of the assignments of error."

69. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action because the said judgment denied to the plaintiff in error, Seaboard Air Line Railway, a construction of the Federal Employers' Liability Act to which it was entitled and which if granted would have defeated the right of defendant in error to recover in this action.

70. The Supreme Court of North Carolina, for the various reasons above set forth committed error in rendering the final
29 judgment it did render against the plaintiff in error in this action.

Wherefore, for these and other manifest errors appearing in the record, the Seaboard Air Line Railway prays that the said judgment of the Supreme Court of North Carolina, dated the 5th day of November, 1914, be reversed, and a judgment rendered in favor of plaintiff in error, and for costs.

November 17th, 1914.

MURRAY ALLEN,
Attorney for Seaboard Air Line Railway.

30 The Supreme Court of North Carolina. Fall Term, 1914.

No. 255.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.
W. B. TILGHMAN, Defendant in error.

Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, a corporation of the State of Virginia and other States, the principal office of which is in the City of Portsmouth, State of Virginia, as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto W. B. Tilghman in the full and just sum of Eleven Thousand Dollars ($11,000.) to be paid to the said W. B. Tilghman, his certain attorney, executors, administrators, or assigns; for the payment of which sum, well and truly to be made, we bind ourselves, and each of our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 17th day of November, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a hearing had before the Supreme Court of North Carolina in a suit depending in said Court, between the said W. B. Tilghman, as plaintiff, and Seaboard Air Line Railway, as defendant, a final judgment was rendered against the said Seaboard Air Line Railway and the said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the said final judgment in the aforesaid suit, and a citation having been directed to the said W. B. Tilghman citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

31 Now, therefore, the condition of this obligation is such, that if the said Seaboard Air Line Railway shall prosecute its said writ of error to effect, and answer all damages and costs which may be adjudged against it, if it fail to make its plea good, then this obligation is to be void; else to remain in full force and effect.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Attorney.*
FIDELITY & DEPOSIT COMPANY OF MARYLAND, [SEAL.]
(S.) By JOSEPH B. CHESHIRE, JR., *Attorney in Fact.*
(S.) By J. L. SKINNER, *Agent.*

Bond approved and to act as supersedeas, this 17 day of November, 1914.

(S.) WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between W. B. Tilghman, plaintiff, and Seaboard Air Line Railway, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised, under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being
33 inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17 day of November, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States District Court, Eastern District of N. C.]

ALEX. L. BLOW,
Clerk District Court United States,
Eastern District of North Carolina.

Allowed by
WALTER CLARK,
Chief Justice Supreme Court
of North Carolina.

This 17th day of November, 1914.

34 [Endorsed:] Seaboard Air Line Railway, plaintiff in error, vs. W. B. Tilghman, defendant in error. Writ of error. Filed —. Filed and copy lodged for defendant in error this 17th day of November, 1914. J. L. Seawell, clerk Supreme Court of North Carolina. Office of Murray Allen attorney and counselor at law, 709-711 Citizens National Bank Building, Raleigh, N. C.

35 UNITED STATES OF AMERICA, *ss:*

To W. B. Tilghman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error, filed in the Office of the Clerk of the Supreme Court of North Carolina, wherein Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this 17 day of November, in the year of our Lord one thousand nine hundred and fourteen.

WALTER CLARK,
Chief Justice Supreme Court
of North Carolina.

Attest:

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court
of North Carolina.

I, William C. Douglass, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and acknowledge receipt of a true copy of same, together with copy of petition for writ of error, assignment of errors, prayer for reversal, bond and writ of error. This 17th day of November, 1914, at Raleigh, N. C.

WILLIAM C. DOUGLASS,
Attorney for W. B. Tilghman,
Defendant in Error.

36 [Endorsed:] Seaboard Air Line Railway, plaintiff in error, vs. W. B. Tilghman, defendant in error. Citation. Filed —. Filed and copy lodged for defendant in error this 17th day of November, 1914. J. L. Seawell, clerk Supreme Court of North Carolina. Office of Murray Allen attorney and counselor at law, 709-711 Citizens National Bank Building, Raleigh, N. C.

37 Seventh District.

No. 255.

W. B. TILGHMAN
against
SEABOARD AIR LINE RAILWAY.

(From Wake.)

Before Allen, J. Defendant appealed.

Caption.

NORTH CAROLINA,
Wake County:

Be it remembered that on the 16th day of May, 1913, W. B. Tilghman sued and prosecuted out of the office of the clerk of the Superior Court of Wake County, against the Seaboard Air Line Railway, a summons for relief in the words and figures as follows, to-wit:

Summons of Relief.

NORTH CAROLINA,
Wake County:

W. B. TILGHMAN
against
SEABOARD AIR LINE RAILWAY.

NORTH CAROLINA,
Wake County:

To the Sheriff of Wake County, Greeting:

You are hereby commanded to summon Seaboard Air Line Railway, the defendant above named, if it be found within your county, to be and appear before the judge of our Superior Court, at a court to be held for the County of Wake, at the court-house in
38 Raleigh, N. C., on the 8th Monday before the 1st Monday of September, it being the 7th day of July, 1913, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of said term; and let the said defendant take notice, that if he fail to answer the complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 16th day of May, 1913.

MILLARD MIAL,
Clerk Superior Court.

Prosecution Bond.

We acknowledge ourselves bound unto Seaboard Air Line Railway, the defendant in this action, in the sum of two hundred dollars; to be void, however, if the plaintiff, W. B. Tilghman, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 15th day of May, 1913.

W. B. TILGHMAN. [SEAL.]
T. A. PERSON. [SEAL.]

Return of Summons.

And on the return day of said summons, to-wit, on the 8th Monday before the 1st Monday of September, A. D., 1913, at the courthouse in Raleigh, before the Honorable C. M. Cooke, Judge presiding, J. H. Sears, sheriff of Wake County, returns said summons endorsed as follows, to-wit:

Received May 16th, 1913. Served May 16th, 1913, by reading the within summons to and delivering a copy of the same
39 to W. T. Huntley, agent at Raleigh, N. C., for Seaboard Air Line Railway.

J. H. SEARS,
Sheriff Wake County,
By J. J. HARWARD,
D. S.

And thereafter, to-wit, on the 9th day of July, 1913, the plaintiff, W. B. Tilghman, by his attorneys, Messrs. Douglass & Douglass, comes and complains as follows, to-wit:

Complaint

NORTH CAROLINA,
Wake County:

In the Superior Court, May Term, 1913.

(Title of Cause.)

The plaintiff complaining of the defendant alleges:

1. That on the 19th day of November, 1912, the defendant was, and had for a long time theretofore been, and still is, a corporation duly chartered and organized and engaged in the operation of certain lines of railway for the carriage of freight and passengers as a common carrier.

2. That one of its said lines of railway, over which the defendant operated its trains of cars as aforesaid, extended from Columbia,

South Carolina, to Richmond, Virginia, passing through the town of Hamlet, North Carolina; the city of Raleigh, N. C.; Norlina, N. C.; Granite, N. C., and Grandy, Virginia, upon which said line of railway the defendant operated a great number of trains of cars drawn by locomotive steam engines which carried large quantities of freight and a great number of passengers from the State of South Carolina into and through the State of North Carolina to points in Virginia and beyond.

3. That on the said 19th day of November, 1912, the plaintiff was, and had been for a number of years prior thereto, in the
40 employment of the defendant as a conductor on its passenger trains, and was on the said 19th day of November, 1912, in charge as conductor as aforesaid of a certain passenger train of the defendant, known and designated as "Number 84," which was scheduled and did leave Columbia, South Carolina, about 6:35 p. m. on the 18th day of November, 1912, and which was scheduled to arrive at Richmond, Virginia, at 5:30 a. m. on the 19th day of November, 1912. That the said passenger train proceeded on its way towards Richmond, Virginia, carrying passengers, express and baggage from points in the State of South Carolina, into, through and beyond the State of North Carolina, into the state of Virginia, and the plaintiff was in and upon said train and in the discharge of his duties as the conductor thereof.

4. That the defendant, at the said date and time, had in movement and operation several other trains, both freight and passenger, some running in the same direction as the train upon which plaintiff was conductor, as aforesaid, and others running in an opposite direction upon the same single line of track between Columbia, South Carolina, and Richmond, Virginia. Among the number moving in an opposite direction as aforesaid was a certain passenger train known and designated as "Number 81," which said passenger train was scheduled to leave Richmond, Virginia, at 1:10 a. m. on the said 19th day of November, 1912, and as plaintiff is informed and believes, said train did leave said point about on schedule time and proceeded in a southerly direction towards Columbia, South Carolina, on the line of track aforesaid.

5. That in the operation of its passenger trains, including trains "Number 84" and "Number 81" hereinbefore referred to, the defendant used a telephone system from Columbia, South Carolina, to Hamlet, North Carolina, and from Hamlet, North Carolina, to Norlina, North Carolina, it had in operation a system of signals known as the "Block System;" that from Norlina, North
41 Carolina, to Richmond, Virginia, the defendant operated its said trains by train orders communicated from Richmond, Virginia, over telephones, to its various agents and operators at its various offices along said line, which said orders were thereafter reduced to writing and delivered to the engineers and conductors of said trains.

6. That the regular meeting point for passenger trains "Number 84" and "Number 81," as aforesaid, as designated by the schedule of the defendant, was at Skelton, Virginia, but said meeting point

was subject to change and superceded by the telephone messages as aforesaid when either train was running late or for other cause appearing to the defendant.

7. That on the morning of the said 19th day of November, 1912, train "Number 84" as aforesaid, which was in charge of the plaintiff as aforesaid, reached Norlina, North Carolina, at 3:35, being one hour late on account of unavoidable delays and it became necessary, under the rules and regulations of the defendant, for the plaintiff to obtain from the defendant's operator and agent orders as aforesaid for the movement of his said train and especially in reference to the meeting and passing of train "Number 81" as aforesaid, which said train was a fast, through passenger train, and plaintiff received from the defendant's operator at Norlina, North Carolina, two train orders, the first one reading in substance as follows, to-wit: "Number 84—Engine No. 91 will run 40 minutes late Norlina to Richmond;" the second train order reading in substance as follows, to-wit: "Number 84, engine 91 will meet Number 81, engine 93 at Grandy." The plaintiff delivered to the engineer in charge of his said train "Number 84" one C. H. Beckham, an experienced, careful and prudent engineer, a copy of said train orders, and the engineer in charge of said train as aforesaid proceeded with said train from Norlina, North Carolina, to the point designated in said train orders as the meeting and passing point for said trains, to-wit: Grandy; and when the
42 said train "Number 84" reached a point about one-half mile north of Granite, North Carolina, and before it had reached the station of Granite, the meeting point designated in said train order, and while the said train was moving at a high rate of speed, his said engine and train met with "Number 81," which was also running at a high rate of speed, (and which said train "Number 81" had been ordered by the defendant to meet train "Number 84" at Granite, North Carolina,) in head-on collision, demolishing both of said locomotives and a number of cars on both trains and painfully, seriously and permanently injuring, wounding and bruising the plaintiff as hereinafter alleged.

8. That said head-on collision, wreck and injury and damage to the plaintiff was caused by the negligence of the defendant in the following particulars, to-wit:

(*a*) In that it negligently and carelessly had and maintained two stations upon its said single line of railway in close proximity, with names so similar in sound and so closely resembling each other in chirography that one might very easily be mistaken for the other.

(*b*) In that it negligently and carelessly failed to have in operation upon its said line of railway from Norlina, North Carolina, to Richmond, Virginia, a system of signals known as the "Block System" to control the operation and movement of its trains, which said system is a preventative of collisions and accidents and a protection to employees and passengers, and which said "Block System" was at said time, and is now, approved and in general use by railroads.

(*c*) In that it negligently and carelessly operated its trains "Num-

ber 84" and "Number 81" upon telephonic communication, depending entirely upon the proper understanding of the said train orders communicated from Richmond, Virginia, and upon the correct transcription of the said train orders by the operator and agent of the defendant at Norlina, North Carolina.

(*d*) In that it negligently and carelessly ordered train
43 "Number 81" to meet train "Number 84" at Granite, North Carolina, and for train "Number 84" to meet train "Number 81" at Grandy, which said last named station is in the State of Virginia, when the defendant knew that the two train orders as given would of necessity cause a head-on collision between the two said trains "Number 84" and "Number 81" at some point between Granite and Grandy.

(*e*) In that it negligently and carelessly ran train "Number 81" in head-on collision with train "Number 84," causing the wreck to the said train and the injury and damage to the plaintiff.

9. That on account of the negligence and carelessness of the defendant as hereinbefore alleged, the plaintiff was wounded, bruised, and shocked, and has been almost totally deaf in his left ear and is now unfit to perform the duties of his trade, profession and calling, to-wit: those of a railway conductor; he has suffered great bodily pain and mental anquish, has lost much time from his occupation and business, has expended certain sums for medical attention and medicines and has been damaged in the sum of $50,000.

10. That at the time of the collision aforesaid and injury to the plaintiff, both the defendant and the plaintiff were engaged in interstate commerce, and the plaintiff brings this action under the "Employers' Liability Act," passed and approved by the Congress of the United States on the 22nd day of April, 1908, and the amendments thereto.

Wherefore the plaintiff prays for *for* judgment against the defendant in the sum of fifty thousand ($50,000) dollars, the costs of this action and for such other and further relief, etc.

DOUGLASS & DOUGLASS,
Attorneys for Plaintiff.

W. B. Tilghman, being duly sworn deposes and says that he has read the foregoing complaint, that the same is true of his own knowledge except as to matters therein stated upon infor-
44 mation and belief and as to those he believes it to be true.

(Signed) W. B. TILGHMAN.

Sworn to and subscribed before me this 9th day of July, 1913.

(Signed) MILLARD MIAL,
Clerk Superior Court.

And thereafter, to-wit, on the 31st day of March, 1914, the defendant, by his attorney, Murray Allen, Esq., comes and answers as follows:

Answer.

NORTH CAROLINA,
Wake County:

In the Superior Court, July Term, 1913.

(Title of Cause.)

The defendant answering the complaint herein says:

1. The allegations of section 1 are admitted.

2. The allegations of section 2 are admitted, except that it is denied that the defendant operates a great number of trains of cars over its line of railway.

3. The allegations of section 3 are admitted.

4. The allegations of section 4 are admitted.

5. The allegations of section 5 are admitted.

6. The allegations of section 6 are admitted.

7. The allegations of section 7 are not true and are denied.

8. The allegations of section 8 and each of the sub-divisions thereof are not true and are denied.

9. The allegations of section 9 are not true and are denied.

10. The allegations of section 10 are admitted.

And for further defense the defendant says:

1. That if the alleged injury to the plaintiff was in any manner caused by the maintenance by the defendant of two stations upon its line of railway, in close proximity, with names similar in sound and so closely resembling each other in chirography that one might be very easily mistaken for the other, which is again expressly denied, such conditions were open and obvious and fully known to the plaintiff, and the danger therefrom, if any, was known to and appreciated by the plaintiff and he continued in defendant's employment as conductor on its trains, running over its lines of railroad, with such knowledge and without objection, and he knew and voluntarily pleads such voluntary assumption of risk in bar of plaintiff's right to recover in this action.

2. That if the alleged injury to the plaintiff was in any manner caused by defendant's failure to have in operation upon its line of railway from Norlina, N. C., to Richmond, Va., a system of signals known as the "block system," which is again expressly denied, such failure to have in operation the said "block system" was open and obvious and fully known to the plaintiff, and the danger therefrom, if any, was known to and appreciated by the plaintiff and he continued in defendant's employment as conductor on its trains running over its lines of railway with such knowledge and without objection, and he knew and voluntarily assumed the risk, if any, incident thereto and the defendant pleads such voluntary assumption of risk in bar of plaintiff's right to recover in this action.

3. That if the alleged injury to the plaintiff was in any manner caused by the use by the defendant of communicating train orders of telephone, which is again expressly denied, the use of such sys-

tem was open and obvious, and fully known to the plaintiff and the danger therefrom, if any, was known to and appreciated by the plaintiff and he continued in defendant's employment with such knowledge and without objection, and he knew and voluntarily assumed the risk, if any, incident thereto, and the defend-
46 ant pleads such voluntary assumption of risk in bar of plaintiff's right to recover in this action.

4. That if the plaintiff was injured as alleged in the complaint, which is again expressly denied, such injury was brought about by his own negligence in failing to exercise the care of a prudent man in reading the orders delivered to him at Norlina, N. C., and his contributory negligence is pleaded by the defendant as a defense to the plaintiff's right to recover in this action.

5. That if the plaintiff was injured as alleged in the complaint, which is again expressly denied, it was his duty under the rules of the defendant to ascertain positively the meeting point of train No. 81 with train No. 84 before leaving Norlina, and if he failed to observe the rules of the defendant in this respect, he was guilty of negligence, and plaintiff's contributory negligence is set up in defense of his right to recover in this action.

6. That if plaintiff was injured as alleged in the complaint, which is again expressly denied, and if after leaving Norlina he was not positive as to the meeting place of trains No. 81 and No. 84, it was his duty under the rules of the defendant to have stopped either at the station of Wise, N. C., or at the station of Granite, N. C., and called the despatcher over the telephone for the purpose of ascertaining positively the meeting point of train No. 81 with the train No. 84, and the failure of the plaintiff to observe the rules of the company in this respect is pleaded by the defendant as negligence, and plaintiff's contributory negligence is set up in defense of his right to recover in this action.

7. That if plaintiff was injured, as alleged in the complaint, which is again expressly denied, and if he was not positive as to the meeting point of trains No. 81 and No. 84 it was his duty in the exercise of the care of a prudent man to ascertain positively such meeting point, and his failure to do so is pleaded by the defendant as negligence and plaintiff's contributory negligence is set up in defense of his right to recover in this action.

47 Wherefore, the defendant prays judgment that it go without day and recover the costs of this action.

MURRAY ALLEN,
Attorney for Defendant.

NORTH CAROLINA,
Wake County:

J. F. Mitchell, being duly sworn, says: That he is agent for the defendant company at Raleigh, N. C., that he has read the foregoing answer, that the same is true of his own knowledge, except as to matters herein stated upon information and belief and as to those he believes it to be true.

(Signed) J. F. MITCHELL.

Sworn to and subscribed before me this 31st day of March, 1914.

A. T. SHAW,
Notary Public.

My commission expires 13th day of July, 1914.

And thereafter, to-wit, on the 22nd day of May, 1914, the plaintiff, by his attorneys, comes and, upon motion, which is allowed by the Court over defendant's objection and exception, files amendment to his complaint as follows:

Amendment to Complaint.

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

The plaintiff in the above-entitled action by leave of the Court amends his complaint heretofore filed herein by adding thereto a paragraph to immediately precede paragraph No. 9 and to be designated as paragraph 8 (F), and reading as follows, to-wit:

"In that the defendant negligently delivered to the plain-
48 tiff at Norlina, N. C., at the said time the train order aforesaid for the meeting of his said train No. 84 with train No. 81, written in such form and manner that if the same was intended to refer to any other meeting place than "Grandy," nevertheless, the same was so negligently written that the word appeared to be "Grandy;" and in that when the plaintiff read his said train order to the defendant before leaving Norlina, as he did so read it aloud in a plainly audible and distinct tone of voice, "Grandy," the defendant negligently assented to and approved the said reading and pronunciation of the said "Grandy;" and in that thereafter and before the plaintiff's said train reached the station Granite, N. C., the defendant negligently twice read the said train order to the plaintiff and each time read and pronounced the same in respect to the meeting place therein designated, "Grandy."

(Signed) DOUGLASS & DOUGLASS,
R. N. SIMMS,
Attorneys for Plaintiff.

NORTH CAROLINA,
Wake County:

W. B. Tilghman, being duly sworn, deposes and says that the foregoing amendment to his complaint heretofore filed herein is true to his own knowledge, except as to matters stated upon information and belief, and that as to those matters he believes it to be true; and further that his complaint heretofore filed herein as thus amended is true to his own knowledge, except as to matters stated upon infor-

mation and belief, and that as to those matters he believes it to be true.

(Signed) W. B. TILGHMAN.

Subscribed and sworn to before me this 22nd day of May, 1914.

(Signed) VITRUVIUS ROYSTER,
Deputy C. S. C., Notary Public.

49 This amendment having been allowed, it is by consent of plaintiff's counsel regarded as denied by defendant and verification of such denial is waived.

The defendant files the following written objection to the Court's granting plaintiff's motion to amend his complaint in the manner set forth in said amendment:

NORTH CAROLINA,
Wake County:

In Superior Court, May Term.

(Title of Cause.)

The defendant files this objection and exception to the amendment to the complaint offered by plaintiff at the conclusion of all of the evidence in this case and on the morning after the said case had been closed the day before: For that the said amendment comes too late and takes the defendant by surprise in that the defendant's defense to the allegations of the complaint was prepared to meet the allegation that the plaintiff was given an order for train 84 to meet train 81 at Grandy, and the defendant did not produce witnesses who were available and could have been secured for the purpose of showing that the order which was found on the body of Engineman Beckham, and which was offered in evidence was written in the usual and customary way and could not be mistaken for an order to meet at Grandy, and in that defendant could and would have been prepared to show by expert railroad men and others that the said order made Granite the meeting point of train 84 and train 81, and that Grandy was not made the meeting point and that the name of the meeting place in said order could not be mistaken for Grandy, and in that the defendant had no opportunity after said amendment was offered to produce and offer its evidence to the jury to meet such allegation, and in that the defendant had no opportunity to examine or cross examine the plaintiff to show that the meeting point fixed by the order offered in evidence by the defendant was Granite
50 and not Grandy, and that if an exact copy of that order had been presented to him at Norlina by the operator he would not have mistaken the meeting points fixed therein, and in that the defendant was prevented in other ways from preparing to meet said amendment.

Without waiving, and relying upon any and all the objections

to the permission of said amendment, the defendant files this written objection.

MANNING & KITCHIN,
MURRAY ALLEN,
Defendant's Attorneys.

Filed.
O. H. ALLEN, *Judge.*

Trial, Jury, Etc.

And thereupon this action coming on for trial the following jurors, to-wit, are chosen, tried and sworn and empanelled to try the issues joined between the parties.

G. W. Mills, T. M. Byrum, W. T. Sanderford, J. A. Riggsbee, S. E. Shepherd, V. L. Riggsbee, W. F. Emory, J. R. Hood, H. B. Thomas, R. M. Chamblee, J. O. Eller, S. R. Seymore.

And thereupon after the introduction of evidence in behalf of the plaintiff and the defendant, and after the charge of the Court, the jurors for their verdict found the isues submitted to them as follows:

Issues—Verdict.

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint and the amendment thereto?

Answer: "Yes."

2. Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

Answer: "Yes."

3. What damages is the plaintiff entitled to recover?

Answer: "$7,000.00."

Upon the coming in of the verdict, defendant moved for judgment non obstanti veredicto. Motion overruled. Defendant excepts.

51 Defendant moves to set the verdict aside as against the weight of evidence. Motion overruled. Defendant excepts.

Defendant moves for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, and in the Court's charge to the jury and in the Court's refusal to give defendant's requests for instruction and in permitting amendment to complaint and withdrawal of causes of action by plaintiff at conclusion of all the evidence. Motion overruled and defendant excepts.

And thereupon judgment is rendered by the Court and entered and filed in this action as follows:

Judgment.

NORTH CAROLINA,
Wake County:

In the Superior Court, May Term, 1914.

(Title of Cause.)

This cause coming on to be tried before his Honor, O. H. Allen, Judge, and a jury, at this the May Term, 1914, of the Superior Court of Wake County, and being tried, the following issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?
2. Did the plaintiff, by his own negligence, contribute to his injury as alleged in the answer?
3. What amount of damages is the plaintiff entitled to recover of the defendant?

And the jury having answered the first issue "Yes," the second issue "Yes," and the third issue "Seven Thousand ($7,000.00) Dollars," and it appearing to the Court that this action was brought and tried under the "Employers' Liability Act" enacted by Congress on the 22nd day of April, 1908, it is therefore,

Ordered, adjudged and decreed that the plaintiff, W. B.
52 Tilghman, recover of the defendant, Seaboard Air Line Railway, the sum of seven thousand ($7,000.00) dollars and the costs of this action to be taxed by the Clerk.

O. H. ALLEN,
[SEAL.] *Judge Presiding.*

To the judgment signed by the Court defendant excepts and in open court appeals to the supreme Court. Notice of appeal given in open court and further notice waived. Undertaking on appeal fixed in the sum of $50.00.

By consent defendant is allowed until July 11th, 1914, to file and serve statement of case on appeal and plaintiff allowed 40 days thereafter to serve counter statement or exceptions.

Appeal Bond.

The defendant thereupon on July 10th, 1914, filed the following appeal bond:

NORTH CAROLINA:
Wake County:

In the Superior Court.

(Title of Cause.)

Whereas, at May Term, 1914, of the Superior Court of Wake County, the plaintiff recovered judgment against the defendant for

the sum of seven thousand dollars and the costs of this action; and

Whereas, the defendant intends to appeal from said judgment to the Supreme Court;

Now, therefore, we, Seaboard Air Line Railway and Fidelity Deposit Company of Maryland, undertake pursuant to the
53 statute in the sum of fifty dollars to pay all costs which may be awarded against said defendant on said appeal.

SEABOARD AIR LINE RAILWAY,
[SEAL.] By MURRAY J. ALLEN, *Attorney.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
[SEAL.] By JOSEPH B. CHESHIRE, JR., *Attorney in Fact.*
[SEAL.] J. L. SKNNER, *Agent.*

Statement of Case on Appeal.

NORTH CAROLINA,
Wake County:

In the Superior Court, May Term, 1914.

(Title of Cause.)

This was a civil action brought by plaintiff under the Federal Employers' Liability Act, passed by the United States Congress, to recover damages for personal injuries alleged to have been sustained by plaintiff while employed by the defendant. The action was tried at May Term, 1914, of the Superior Court of Wake County, before his Honor, O. H. Allen, Judge, and jury. The pleadings, which appear in the record show the conditions of the parties. The issues, with the answers made thereto by the jury, and the judgment appear in the record.

Plaintiff offered evidence as follows:

W. B. TILGHMAN, plaintiff, being duly sworn, says:

My name is W. B. Tilghman, age 53. Heretofore my business was passenger conductor from 1900 to 1912 for the Seaboard Air Line Railway. I started with the Seaboard in 1891. Up to the 19th of November, 1912, my health was good. My weight was little
54 over 200. I have been losing flesh gradually ever since I come off the road. My work there with the road ceased November 19th, 1912. On the 19th of November, I was on train 84, Seaboard Air Line, going north. The passenger cars ran from Jacksonville to Washington. My run was from Columbia, S. C., to Richmond, Va. That train left Columbia about 6:35 on evening of 18th. I came by Raleigh and went on north. I reached Norlina the morning of the 19th, about 3:35, as near as I can remember. We were due at Norlina about 2:40, must have been 55 minutes to an hour late.

When I arrived there I had a car put off, as a usual thing, for Portsmouth. After doing this, I went in the office, the telegraph office, and received orders. One was to run 40 minutes late to Acca, the other was to meet 81 at Grandy. The operator, by the name of Watson, I think his name was Watson, the operator on duty any way gave me these orders. I could not say as to that, as to whether I got the top copy or not. Those orders were destroyed, I suppose, in the wreck where we met 81. I have never seen them since. I don't know what b-came of them. I know where I put them, on the front seat in the colored car, where they were usually kept until they were carried out. One of the orders was to run 40 minutes late to Acca, or Richmond, the same thing, and the second was to meet 81 at Grandy. Grandy is about 30 miles or 31, over in Virginia. Granite is little over 7 miles from Norlina in North Carolina, near the line. Granite is between Norlina and Grandy. When I got th-s order to meet this train 81 at Grandy, I read the order in the office. No one in there except the operator. I think his name was Watson. He was the operator in charge. I held it up and read it as we were instructed to do, to read all the orders to the operator. I read just what was on the order. Order No. 9 is annulled. Train 84, engine 91, will meet train 81, engine 93, at Grandy. I read the word Grandy. He used the word Grandy distinctly. Then, he didn't say anything. I had two copies of the order, one to deliver to the engineer. I took it to the engine and delivered it to Engineer
55 C. H. Beckham. He lived in Raleigh. I don't know how long he had been in the employ of the Seaboard road, but it was some years. 17 to 20 years, or probably longer than that. I could not say how long. The train he was engineer of was a first-class pas-enger train. He read the order down on the foot-board. He read the order as I did: 84, engine 91, would meet train 81, engine 93, at Grandy. I had no other business with him, after his reading the order, so I went back to the baggage car, ready to leave. I went in the baggage car and read the order to Mr. Bryant. I read that order to Mr. Bryant the same as I did to Mr. Beckham. I read him the meeting point at Grandy. I read it distinctly. I handed him the order. He read it, and when he got to the meeting point, I said meet where, and he spelled it out Grandy. I looked at it, and then I remarked to Mr. Bryant that I thought it was bad policy to have the names of stations so near alike, as it was likely to cause trouble. We always examined the order with more than usual care as they were so near alike. We proceeded. Went along, and I went back to get up my tickets as usual and do my work, and left Mr. Bryant and the porter in the baggage car, and went to the rear of the train and returned and made some remarks to the passengers and I heard Beckham blow station blow for Granite. We had nothing to do at Granite, so I proceeded from there and went on toward the baggage car. We passed Granite and I saw a freight train in there. I did not hear any other whistle or signal at Granite, except the station blow. I saw no lights except from the freight train. About a quarter of a mile below the station we struck 81, head-on. I was at the rear end of the combination car, baggage and

colored passengers, I don't know exactly what happened for the time being. I was knocked from the rear door to the partition door. Half the length of the car. I was struck all over. Busted this knee open, but my head is the principal place. Just above this left ear here. When I was able to get out, all was in darkness then.

56 I got out of the car as best I could and looked to see who I could help. I knew there had been a collision, but I didn't know what I had struck, as I wasn't expecting 81 there, and by the help of a dead-head porter we got our regular porter out of the wrecked car. I went back up the embankment and found an old lantern laying down on the side and found that I could not get to my baggagemaster. The car was in such position that he could not get out. I knew that he was suffering, had been scalded with hot water. I then remembered that 32 was following me, another passenger train, with the same rights and the same class, and it was my duty to go back after finding that no passengers were hurt, to go back to Granite to protect the rear end of our train, which I had to go back to flag. I went back. I stayed until I delivered my message, and saw that 32 did not go into us, and the operator and the agent in the meantime had been called. I was pretty weak, and some doctor came in there and saw my condition, but I don't remember what he gave me, but I don't remember anything else after that. About the first thing I remember it was after I got to the hospital. I remember once or twice I remember waking up, but I don't remember anything much. Before I regained consciousness it was about 12 hours. I was taken to the hospital at Richmond and got there late in the afternoon, but I don't remember. I suppose by the time I regained consciousness it was time for me to go asleep again at night. It must have been about 12 hours, near that, when I regained consciousness. The time I stayed at the hospital I was pretty weak, and I felt this deafness immediately in the left ear. I felt it right away. As soon as I became conscious I felt the ringing and deafness. I had never had any trouble with that ear before. It has been in condition of deafness ever since. I can hear a little. I can not distinguish any sound. It is almost gone. I have to turn to hear from the right side altogether to tell or distinguish any sound from the left ear. Dr. Hillman was my doctor all the time until I left

57 Richmond in April. My ear is now just like it was, if anything, worse than the time I first complained of it. I don't know what it was I struck. I suppose it was one of the seats when I was knocked down. My body was bruised all over. My arm, leg, back, shoulders, I was struck all over, but the only place broken was this knee, it busted that knee open, just below the knee. The doctor soon fixed the place up on the leg. My physical condition is not such as to do a man's work. I can do very little. I cannot do the labor or work I could do before. I have had shooting pains through my body. All through body and legs. Nothing else, but a general breakdown, and these pains, which do not last, of course, long at the time, but a gradual breaking down and weakness, getting weaker all the time, falling off. I have no appetite, very little, and very little strength. I do not rest well at night. I don't feel like the

same man. A man that falls off 53 pounds don't look like he did before. I am very nervous. Before I didn't know I had any nerves. Conductors must have perfect hearing. I was paid about $210.00 a month, as conductor, on an average. Since my injury, from the time of the injury up to the present time, I worked six months at $50.00 a month, $300.00. I am not physically able to perform the duties of a railroad conductor now. I hadn't felt it so much when I first came out of the hospital. I could have gone to work, but I could not have *help* up. I am gradually getting worse off than when I came out. I had known Beckham for a number of years. I expect over 15 years. It is admitted that C. H. Beckham was killed in the wreck referred to near Granite, N. C. Faison was engineer on 81. He was killed also. It is admitted that the fireman on No. 84 was killed. I think that we were running between 50 and 60 miles an hour. I don't know at what speed the other train was running. No office open at Granite at night. We had no key, and the office was locked up, I believe. I had no key to the office and office was locked.

58 The first open office on the Seaboard road after leaving Norlina and going toward Richmond that you reach at night would be La Crosse. The distance (from) Norlina to LaCrosse is 20 miles. Three or four stations between Norlina and LaCrosse, Wire, Granite, Bracey, Hagood. No open office at Wise. The distance from Norlina to Granite was little over 7 miles. Dr. Hillman doctored me from the 19th. He had been my family doctor at one time, but on this occasion from the 19th of November until I left in April, at Richmond. I did not continue to take Dr. Hillman's medicine after I left Richmond. Before this injury that I received I had never had any of those shooting pains. Before the injury I never had any trouble with my bladder; never had any trouble about sleeping; my appetite was good, and my hearing was all right.

Cross-examination:

I was suspended or off from service from February to May, 1912. I don't know what you call it, but I wasn't on duty at that time. I had been reported by some operator to the superintendent for drinking, and he suspended me or put me off. I was off at the time on the charge of drinking. I don't know whether it was a discharge or not; I didn't ask any help, but I was put back. I suppose telephone system had been in use on the Seaboard a year or two. They used the telegraph before that. I knew that they were using the telephone system. Under that telephone system of transmitting train orders, the operator takes the order over the telephone and writes it out, making several copies at one time. I suppose it depends how many he wants, how many trains to be handled. If he had only one train he would make 3 copies. He reserved 1, and 1 for the engineer and 1 for me. When the operator presents that order to me I sign for it. I sign for all copies at one time. I sign on the top copy, and that makes the impression through the carbon on the

59 other two. And when I sign it is presented to me with the top copy and the carbons and the other two copies under it for me to sign. I signed the order I got. And I signed on

the order that engineer Beckham got. I signed all 3 copies at the same time. At the time I signed the orders, the operator was in the office. Various parts, walking up and down. At the time I signed it he was standing over at the west window. He handed the orders to me for my signature. After I sign this order, the operator completes it with the dispatcher. Complete was on the order when I took it out to the engine. I don't know when it was put on it. Complete on the order means it is ready to be delivered. When he gets "complete" he delivers the order to the conductor. To get the word "complete" he communicates with the dispatcher. The word "complete" on the order means, I suppose, the order is ready to be delivered. It means that the operator has communicated with the dispatcher and they have completed the order. It means it is complete and that I have signed for it. When that is done, the operator repeats the meeting point to the dispatcher. We don't get it until it is completed, but we don't always hear when it is completed. After I signed these 3 orders, I left the office and went out to the engine. I went out to the engine and delivered a copy to Mr. Beckham, the engineer. I did not take those copies off the pad. The copies off the pad were handed to me. I got two copies, and one of those copies I handed to engineer Beckham. The order he had was one of the 2 that was written by the operator and that I signed. I don't know which one I gave Beckham. I gave him one of the 2 I had, and kept one. Under the rules of the company, the conductor has charge of his train. I was in charge of train No. 84 that night as conductor. The conductor has a means of communicating with the engineer on his train, by signal cord, placed at different places in different cars, not always in the same position. It is a whistle cord. In my train the whistle cord was in top of the car, down the center aisle where the conductor can reach up and signal the engineer. There is a means by which I can apply the emergency brake on each car, that will stop the train. If the engineer of my train were doing anything contrary to orders that was liable to affect the safety of my train, I could stop him. In approaching a meeting point, the engineer gives a signal, the station blow, and the conductor acknowledges it, with one long blast of the whistle, to remind him of the meeting point, and he answers two short. But if the engineer did not answer, or if I thought that he overlooked it, I have means of stopping the train. And it would be my duty as conductor to stop the train. I was supposed to be looked upon as being responsible for the train. The conductor had charge of the train. I was in charge of the train and could control the engineer when it was necessary. I could make him stop anywhere and stay there. I had authority to make him do anything I thought necessary for the safety of the train. The distance from Richmond to Grandy is about 67 miles. At these offices between Norlina and LaCrosse that I named this morning, there was a telegraph office and operator in the day time.

They had been closing these offices at night for some time previous to this collision. I don't think they ever had any night offices there. They had day operators there and closed the offices at night

prior to this collision. In the operation of my train, it was my duty as conductor in the case of doubt to pursue the safe course. When I was running as conductor, my run was principally at night, going north, and I would sleep the day time. I did no other work except that as conductor. Since I have worked in garden and I have a pair of mules and have been plowing as much as an hour a day, trying to get my strength back. I ran one dray in Greenville hauling tobacco. I was examined by other doctors in Richmond, just a little while after the accident. I was examined by Dr. Hillsman and Dr. Dunn and Dr. Gray. Dr. Dunn is a specialist in Richmond on the ear. Sometime after this accident I presented a certificate of
61 Dr. Hillsman to the superintendent. I made application to return to work to the superintendent of the Seaboard. I went on the 7th of January in the office, and he wasn't in. I left the paper that Dr. Hillsman gave me. I didn't hear from him on the 8th, and on the 9th I called on him again, and he stated he didn't want me to go back on that run. I stated at that time I was ready to go back to work, and that I thought I was physically able to go back to work. I told Dr. Hillsman that I was able to return to work, and I wanted the letter as a basis for resuming my duties on the Seaboard, and I presented it to the Superintendent for that purpose. A good many of us, conductors, were warned by the officers of the company against drinking. We received a letter; I was one of them. I didn't carry two passengers by their station once when I was drinking. I do not remember during the session of the Legislature in Columbia, in 1911 or 1912, I was in an intoxicated condition and passed Conductor Clements, going out of the hotel in Columbia. Mr. Clements will not state that. Conductor Matthews never spoke to me about my drinking. I was never notified by any officers of the company, other than that letter I referred to. I received a personal letter warning me against drinking. Drinking on duty by conductors is a dischargeable offense.

At the time I was before Superintendent Gore for drinking I didn't state to him that I had been drinking, and I didn't make him a promise that I would not drink any more. At the time that I was reinstated, I didn't make a pledge of total abstinence. After I made the application to return to work, the superintendent in Richmond refused to permit me to do so. He refused to reinstate me. That was in January, 1913, the January after the accident. After that I made other applications to be reinstated through our general chairman, and I continued to for 4 or 5 months after that. I had in my application through our general chairman for reinstatement up to April 24th, and if I had been reinstated, I would have returned to work, provided they had settled my accounts, etc. I was ready, with
62 those settlements, to go back to work. In referring to my accounts, I mean payment for the time that had been lost, my expenses while off and time. From Granite to the point of this collision I suppose was quarter of a mile or over. It would have been only a very short while before 81 would have come into Granite, just a few seconds. If I had stopped at Granite, I would have been there only a few seconds before 81 arrived. If I had stopped there on the

main line 81 would have come in in a few seconds and would have taken the siding. Mine was the superior train. I had the right of track and was on the main line. I would have kept the main line and 81 would have taken the siding. My train would have stayed on the main line. If I had stopped at the station at Granite I would have stayed right on the main line and in a few seconds 81 would have come in sight. When I made application for reinstatement to the superintendent, I don't think I said anything about any deafness in my ear. I told Mr. Dodson, our general chairman, how I felt about my deafness. I don't know whether Mr. Dodson told the company or not.

Redirect examination:

I did not have any orders to stop at Granite. I didn't have any orders with reference to any train meeting me there. I never took a drink while on duty on the Seaboard. Never in my life. As the result of the investigation under the charge made against me for drinking, for which I was suspended by the raidroad company they put me back to work. I had very little to say and so did they. They put me back to work. It was an operator who made report. I have taken to my certain knowledge two drinks in the last three years. Before that, I suppose it would amount to not over a pint a year, if that. Under the order, my train had the superior right of way at the point of the collision. There is a great deal of difference in my condition now and when I left hospital. I am unable to work
63 now. Before, I felt for a short time I was able. My strength in regard to manual labor before this was all right. I felt very well. I felt like a man. I had not drunk anything the day or night of this collision.

J. A. Dobson, a witness for the plaintiff, having been duly sworn, testifies as follows:

Direct examination:

I live in Portsmouth, Va. Have been in the railroad service about 25 years. I have been brakeman and conductor, and for the last 13 years I have been general chairman of the conductors on the Seaboard Air Line. I ran train about 3 years on the first division of the Seaboard Air Line with Captain Tilghman. I was in the freight service and he was in the passenger service. I have known Tilghman for 15 and a half years, I guess. I know his general character. It is good, so far as I know. Prior to this accident, so far as I was able to determine, Tilghman was physically a well man, and had that appearance, and while I have not seen Tilghman for a year prior to yesterday, there is quite a change in him in his physical condition at this time compared with prior to the accident that he had on the Seaboard Air Line. I detect this in speaking with him. I find that he is hard of hearing in his left ear, I think it is. I detected that yesterday in speaking with him, and I see that he must have lost 40 or 50 pounds in flesh and looks as if he is in rather bad shape at this

time physically I have had quite a lot of experience with the block system. On the majority of the well-regulated railroads in the country, on many districts, they operated what is known as an absolute block. That means that one train will be permitted to use that portion of the track between two given points, two telegraph offices, at one time, and there will be only the one train in there.

64 Q. Does that lessen the danger of collision?

Objection by defendant.

By the COURT: I do not at present see the connection, so I will sustain the objection.

By Mr. DOUGLASS: We allege that the absence of the block system was one of the causes of the accident.

Objection by defendant overruled. Defendant excepts.

Exception No. 1.

A. Very much so. And it places the responsibility on additional man other than the conductor and the engineer, and gives additional protection. For example, had the Seaboard been operating under an absolute block system this particular district, the semaphore signal at this station Granite would have been read, and would not have been changed to white until train No. 81 arrived. That is the protection that this train would have had under the absolute block that it did not have in the absence of it.

Objection by defendant to this answer as not being responsive. Objection overruled. Defendant excepts.

Exception No. 2.

Q. Has the Seaboard Railroad, or did it at that time in its operation, have any part of its system under the absolute block system?

Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 3.

A. I think so. Yes, I think some of the districts were working under the absolute block system. This block system was not in use at the time of this accident between Norlina and Richmond.

65 Cross-examination:

The telephone system of communicating train orders is in general use on the majority of the larger lines in this territory. It is an approved system of dispatching trains. The block system is used in the districts in which there is the heaviest traffic, and where there is a density of traffic, or where they have a district of railroad where it is dangerous from a railroad standpoint where there are heavy grades. It is generally used under extraordinary conditions on account of the density of the traffic or the condition of the road on some, or the majority of the lines, but some of the lines in the territory use the block system over the whole system. The majority of the roads who do use it, use it only on a part of the system. Where the

traffic is densest and where there are a number of trains running over the same line, they operate this absolute block system. Where they use the same track they use the block system. That exists on some of the lines in this territory. It exists on the Seaboard between Norlina and Hamlet. They have the block system between Norlina and Hamlet. I detected on yesterday that Captain Tilghman was a little deaf or hard of hearing. That was the first time I had noticed it. He might have spoken to me at the hospital when I visited him 4 or 5 times. I haven't the record with me to show just when I visited him in Richmond. He might have said something to me about being hard of hearing at that time. If he did, I do not recollect it. At the time the effort was made to reinstate him in the service of the company, he was in much better physical condition than he is at present, and I did not detect that he was hard of hearing. If I had, I would have mentioned it in my negotiations with the management. In my negotiations with the management I made them understand that Tilghman was in perfect condition to go to work. I had every reason to believe that he was physically able to go right back on his train and perform proper service on the train. He came down to Portsmouth, to the general offices, and was there several days
66 and I was with him practically every day. The decision from the general superintendent was rendered February 14, 1913. The conference was held February 19th, March 7th and March 16th, and this decision here is the result of those conferenc-s from the general superintendent of the road, at that time, Mr. J. M. Shea. As a result of those conferences, they refused to permit Captain Tilghman to return to work.

Q. Did they hold him responsible for this collision?

Objection by plaintiff. Objection sustained. Defendant excepts. Exception No. 4.

—. Mr. Tilghman was not present at the conference. I was representing him at his request. They did not refuse to reinstate him on account of any physical condition.

Objection by plaintiff. Objection sustained. Defendant excepts. Exception No. 5.

As his agent I represented to the management that he was able to return to work. I had quite a good bit of experience as conductor prior to becoming general chairman. I was on Norfolk and Western and Southern Railway and Seaboard. I was with the Seaboard about fifteen and a half years. A passenger train is in the charge and control of the conductor. The rules hold both conductors and engineers responsible. The conductor has means by which he can communicate with the engineer on passenger trains by bell cord signals, by which he can stop the train, by applying the emergency brake. In some of our coaches the emergency cord is in the center of the car, right up over the signal cord, but on others it is on the side of the car, but in either case it is easy for the man to reach up and pull it and put on the emergency brakes and the train stops immediately.

If an engineer passes a meeting point, and the conductor
67 knows it, it would be his duty to stop him immediately by applying the emergency brakes. He could do that by simply reaching up and pulling the cord. The conductor generally directs the movement of the train. It is the conductor's duty to direct the movement. The rules direct him to do that. It is the conductor that has charge of the train. He has jurisdiction over the engineer, brakeman, flagman, and everybody. However, he has no right to authorize the violation of the rules of the railroad company. But he can do everything he can to prevent a violation. And everything on there is under his control so far as preventing a violation is concerned. It is the duty of the conductor in case of doubt to pursue the safe course. That is the requirement of the standard rules in effect upon all the railroads, not only applying to conductors but all classes of railroad employees. That was the rule on the Seaboard at that time and now. If a conductor was in doubt as to the meeting point fixed by a train order it would be his duty not to accept it. If he discovered it after he had accepted it, it would be his duty to stop immediately and make some effort to get the correct information concerning the order from the train dispatcher who gave it if he detected that there was anything wrong with him after he accepted it. If a conductor should have any question as to it between two points, as to which was the meeting point, and he reached one of those points, it would be his duty to ascertain from the proper officer of the company at which one of these points they were to meet. If there was a doubt and he reached one of the points, it would be his duty to stop there. I would say if a meet order gotten over the telephone and communicated to the conductor is observed by the conductor, it isn't just as safe as the block system for the purpose of preventing accidents, if it is a proper order. The block signal is an additional protection; in other words, it is a double protection against the order. If a conductor gets a proper order and observes it, it would be as good, but if the conductor and engineer do not observe the order,
there you are, but in the block system, there is the double
68 protection. If they got an order, a proper order, and that order is observed, there will not be a collision. That is all the block system can do. But with the block system it is a double protection. The other is a protection if it is properly observed.

Redirect examination:

If the conductor was to get an order at a station under the system of signals in use at that time, it was his duty to read that order to the operator. Having done that, it was his duty to then carry a copy to the engineer and have the engineer read it to him. And after that it was his duty to read it to the baggagemaster. After receiving an order from the operator, and complying with all the rules in regard thereto as to the meeting point, it was his duty to proceed to the meeting point, and see that his train stopped there until the train mentioned in the order arrived. This is a pretty hilly, rough country, traversed by this road from Richmond to Norlina, some parts of it.

This part upon which this accident occurred is hilly, with a great many curves.

Q. As to meeting points under the absolute block system, what is the rule with respect to signals?

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 6.

By Mr. ALLEN: All of these questions with reference to the block system are objected to. Our objection covers all of this line of inquiry.

A. Signals at block offices remain at danger.

Q. What does a white light indicate?

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 7.

69 A. Safety and notice to proceed.

Recross-examination:

That white light would not indicate or would not supersede any special train orders. In the absence of that white light it would indicate danger. But even if the light was there and they had train orders, they would observe the train orders. In 24 hours I would figure 8 or 10 passenger trains over that line south and north in 24 hours at that time. That would be 4 or 5 in each direction. At that time there were 35, 43, 81 and 33 going south. This was in November and the limited wasn't on. Going north 36, 66, 84 and 32. Four trains in one direction and four in the other.

W. B. TILGHMAN, plaintiff in this action, having been recalled, testified as follows.

Redirect examination:

Q. After you received this order at that telegraph office at Norlina, and after, as you state, Mr. Beckham read it to you, and after you read it over to Mr. Bryant, did you have any doubt as to that meeting point in there being Grandy?

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 8.

—. No, I had no doubt about it being Grandy.

Recross-examination:

On the morning of this collision, when I went back to flag 32, I went in the station. I don't think there was anybody there
70 when I first went in except the operator. But some others came in later. Some one went up to the house and brought some blankets down there. I don't know who it was. I had very little conversation with anybody. Mr. Coleman was not there at the time. I was present part of the time when they communicated with the dispatcher there at Granite that morning. Telephone was right

there in the office. The agent was there when I got back there. He was the operator.

Re-redirect examination:

I could not say whether the Granite office was open when I passed.

J. T. HORTON, a witness for the plaintiff, having been duly sworn, testifies as follows:

Direct examination:

I live in Raleigh. I ran as fireman 3 years and ran an engine 6 years on the Seaboard. I was an extra passenger man the last 4 years, and I pulled Captain Tilghman as much as I did any of the passenger conductors. His character is good. I have never seen Captain Tilghman under the influence of liquor. I have never seen him take a drink or smell it on his breath. I am familiar with the block system.

Q. Do you know whether or not that is in general and approved use on most of the railroads at the time of this collision or wreck? State whether it was.

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 9.

A. It was *on* use on the roads I have been on. I have never been on any but the Norfolk & Western and the Seaboard.

71 —. Do you know whether or not that is—What is the block system? Explain the block system to the jury.

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 10.

A. It is a piece of track between two open telegraph offices or station-. An absolute block—only one train is allowed in the block at the time.

Q. State if in your opinion it minimizes the danger of collisions.

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 11.

A. Yes.

Q. Is it a safety appliance?

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 12.

A. Yes.

Cross-examination:

Being the engineer on Captain Tilghman's train, I would not at all be likely to see him drinking on a passenger train unless he was on the engine. Between Hamlet and Norlina the Seaboard has the block system. Of course if anybody makes a mistake and turns two trains in the block there is liable to be a collision. If the train orders are observed by the men, that will prevent a collision. If the orders

are correct, and everybody observes them, there will be no head-on collision.

72 Redirect examination:

If the operator transmits the wrong order, it would be as fatal as the non-observance of a proper order. I don't remember getting any particular order but the meet order and the one to run forty minutes late we got at Norlina. I didn't get an order at Norlina, which was annulled, saying we would meet 81 at Hagood. After a few weeks I went to see Dr. Dunn in Richmond. He is a specialist of high standing. I was examined at that time by Dr. Dunn and I asked him to give me a letter about my condition, saying I wanted it for my lawyer. Dr. Dunn gave me the letter. When the deposition of Dr. Hillsman was taken in Richmond, the deposition of Dr. Dunn was not taken.

The deposition of Dr. B. W. Hillsman, taken before Cary Ellis Stern, notary public, at Richmond, Va., on May 11th, 1914, was offered in evidence by the plaintiff.

At the time this deposition was offered in evidence, it was stated by plaintiff's counsel that efforts were being made to secure Dr. Hillman's attendance in person, and that he would probably be in court as a witness on the following morning. Defendant's counsel objected to the deposition being read if Dr. Hillsman's attendance could be secured. Objection overruled and defendant excepts.

Objection No. 13.

Counsel for defendant stated that if the deposition was read because of the witness being beyond the limits of the state and not in attendance upon the court, the defendant would then enter its objection to reading the deposition and subsequently putting Dr. Hillsman on the stand to testify in person. Objection overruled and defendant excepts.

Exception No. 14.

73 *That* Court stated that plaintiff's counsel could close their case and take the chance of Dr. Hillsman's coming, or could use his deposition and the Court would rule upon the question of Dr. Hillsman's testifying in person if he should be offered as a witness after the deposition had been read. That paintiff's counsel thereupon offered the deposition in evidence and proceeded to read it to the jury, the Court reserving the right to allow Dr. Hillsman to testify if he was offered.

Upon opening this deposition before the clerk of the Court of Wake County, the following agreement was entered into by counsel for plaintiff and defendant: "Depositions opened by consent with agreement that any and all objections that might have been made before the clerk may be made before the Court with full effect as if made before the clerk."

Dr. Hillsman.

In this deposition, Dr. Hillsman testified as follows:

My name is B. L. Hillsman; 41 years old; 406 West Grace St., Richmond, Va.; physician. I have been practicing medicine since 1898. I am now in the active practice of medicine. I hold the chair of clinical surgery at the Medical College of Virginia. I have complied with the state laws of Virginia as to practicing medicine. I belong to Richmond Academy of Medicine and Surgery, Tri-State Medical Society, Southern Medical Association, American Medical Association, and the Southside Medical Association. I have my certificate of graduation and certificate required by our state law for the practice of medicine and surgery. I have known Captain Tilghman about ten years. I was called to the Byrd Street Station on November 19th, 1912, to meet the Coast Line train there bearing Captain W. B. Tilghman. I found Captain Tilghman in a dazed condition and very nervous, suffering a good deal with his head and the injury to his right knee. I moved Captain Tilghman to the Virginia Hospital at 12th and Clay Streets and on examination found a badly bruised right knee and symptoms leading me to suspect frac-
74 ture of the skull. On X-Ray examination I found no fracture, so decided that the injury was due to a laceration and contusion of the brain -issue, caused by a blow from some blunt instrument over the right side of the head about an inch and a half—the left side of his head about an inch and a half above the lobe of the left ear. Captain Tilghman remained in a dazed condition, approaching semi-consciousness for a week or ten days, when he commenced complaining of deafness in the left ear. This deafness continued to grow worse when I referred him to Dr. Jno. Dunn for examination. There was no rupture of the drum of the ear and on closer examination by Dr. Dunn certain facts were brought to my attention which I afterwards verified. On examination I found beginning locomotor ataxia, beginning hardening of the spinal cord, the arglarobinson pupil and the Rhomberg symptom of beginning locomotor ataxia. Before this injury I had seen him two or three times a week. He lived there right near me on Park Avenue. I would say that Captain Tilghman was as perfect a specimen of manhood as I ever saw. Before the injury Captain Tilghman was a man weighing 190 or 200 pounds with a perfect physique. I would say now he would not weigh but 145 or 150 pounds. Syphilis, whiskey and cases are recorded of violent injury to the cerebro spinal system. I discovered injury to his brain.

Q. Now, doctor, from your knowledge of Captain Tilghman before and after this injury and from your actual experience and your examination and treatment of him, what, in your opinion, was the cause of the appearance of the symptoms of locomotor ataxia in his case?

To this question defendant in apt time before the notary public and in open court when the deposition was read to the jury objected. Objection overruled and defendant excepts.

Exception No. 15.

A. Well, I knew of none of the usual text-book causes of
75 locomotor ataxia other than the injury to his nervous system, produced by this injury.

In my examination and treatment of Captain Tilghman I did not discover any of the evidence of syphilis. I think I would have discovered them in such an examination. I lived near Captain Tilghman about eight years and I have never seen the Captain under the influence of liquor. I did not discover in my examination and treatment of him any indication of the excessive use of alcohol.

Q. I wish you would please describe, doctor, as best you can what is the character of locomotor ataxia, its progress and its usual effect on the human system.

To this question defendant in apt time before the notary public and in open court when the deposition was read to the jury objected. Objection overruled and defendant excepts.

Exception No. 16.

A. Locomotor ataxia commences with the signs I have just enumerated above—the argla-robinson pupil and the Rhomberg symptoms and the peculiar gait with shooting pains in various portions of the body due to the hardening of the anterior columns of the cord. It is a progressive disease and, up to the present time, incurable. I think Captain Tilghman had been in the hospital before he complained of the deafness to which I have referred.

Cross-examination:

I did not see his brain. Laceration of the brain is a general shaking-up with a tearing of the covering of the brain and producing punctate hemorrhages throughout the brain tissue. In other words, a sort of pulpifying of the tissue. The scar on Captain Tilghman was simply a little bruise. Entirely superficial as far as I could see. After Captain Tilghman left the hospital I saw him two
76 or three times a week sometimes. I have been overlooking the Captain practically ever since his injury. The slight injury to his knee cured entirely. This superficial scar on the side of the head got well of itself. I do not remember how long the Captain was in the hospital. I had my notes with me, but I lost my book somewhere. I do not know. I think he was there about ten days or two weeks, as well as I remember. After I started out from home I lost my visiting list and all. My treatment of Captain Tilghman has been successful except for his continued deafness and the symptoms of this locomotor ataxia. As far as I can see that is all. He is deaf—deaf in his left ear. What injury has been done to the auditory nerve I do not know. I do not know whether this hemorrhage has gone down to the inner ear or not. I don't know what is the matter with his ear. No, sir, Captain Tilghman showed these evidences of locomotor ataxia about a month after he was injured. That was the first time we noticed it. After I sent him to Dr. Dunn, Dr. Dunn called my attention to these symptoms and I verified them. That was after he left the hospital. The percentage of cases of locomotor ataxia caused by traumatism is very small. You have to take it

when you can't find anything else. This is the first case that I could not find any other cause. If it is a fact that Captain Tilghman was a heavy drinker I would consider it very seriously as a cause of the locomotor ataxia. If I didn't know this other trouble, that would be the cause to which I would attribute it if I knew he was a heavy drinker prior to this accident.

Independently of that, knowing this other trouble, I would say it would be the more liable of the two causes. Syphilis first and then alcohol are put down as the two principal causes. By alcohol I mean the drinking of whiskey. I don't know what percent, but a large number of cases are ascribed to those causes. Nearly all of the cases are ascribed to those two causes by the authorities.

I do not know what causes the hardening of the spinal cord. I gave the causes as syphilis, alcohol and traumatism. That is
77 what locomotor ataxia is. Of course, we don't know, but it is supposed to be the poison from syphilis or the poison from alcohol on the nervous system. When Captain Tilghman left the hospital his condition was improved; he was conscious, thoroughly; still in a very nervous condition and partially deaf in the left ear. Captain Tilghman was not a well man when he left the hospital. His condition was practically like it is now except he is a little worse. He has fallen off more; his deafness is not improved and then his locomotor ataxia is practically about at a stand-still.

Witness identifies letter dated January 6, 1913, as follows:

"JAN. 6, 1913.

Mr. J. H. Witt, Supt. S. A. L. R. R.:—This is to certify that Captain W. B. Tilghman was injured in a wreck on the 18th Nov., 1912. He has been unable to resume his duties on account of said injuries until the present time. He is now able to go back on his run.

Yours truly,

(Signed) B. L. HILLSMAN, M. D."

This letter was offered is evidence by defendant as Exhibit No. 1, to the deposition.

At the time I wrote that he was well enough to go back to work. He is not in the last stages of locomotor ataxia. There are hundreds of men with locomotor ataxia going right on to work now, today; lawyers, doctors, and all other professions. Going right on with their work. Captain Tilghman was in that condition when I wrote that. Able to go back to work. He is able to do his work today. Locomotor ataxia has not affected his memory. It is only entirely motor. It affects the motor faculties. Later on it appears in the limbs. He has not gotten to that stage of it. He is able to go back to work tomorrow. Tilghman looks worse than he did when he was removed from the hospital. You cannot tell how long it will
78 be before the shuffling gait commences. It may commence next week. It will finally kill him. These people generally live from ten to fifteen years. I should think Captain Tilghman is about 52 or 53 years old, possibly. It depends what part of the hemorrhage is in whether it affects the spinal cord. It may not have

any effect on the spinal cord, but it might in the track, or all of the nerves, come from the brain to the spinal cord. If it is sufficient it would produce paralysis but you can see a man with a gill of blood on his brain and not be paralyzed; because we have centers for the motor tracts and if it is not on the motor tract he is not paralyzed. This letter was given to Captain Tilghman. That was the day he wanted to go back to work, I think. He said he was able to go back to work. I think that is the way I gave it to him. I thought he was able. In that letter I did not have any reference at all to his hearing. I do not know what the rules are in regard to railroads. I stated that the cause of the hardening of the spinal cord was due to certain poisons which accumulated there from the drinking of whiskey, from syphilis troubles and from traumatic troubles. Now in respect to traumatism, poisons from the injuries would produce punctate hemorrhages in the cord and they produce the same cause as alcohol and syphilis.

Q. Doctor, you can state in your opinion as a medical practitioner and surgeon whether or not the injuries received by Captain Tilghman at the time are permanent or not.

To this question defendant in apt time before the Notary Public and in open Court when the deposition was read to the jury objected. Objection overruled and defendant excepts.

Exception No. 18.

A. From my observation o the casef I believe they are.

In the latter stages of locomotor ataxia they have what are called lightning pains—sharp shooting pains. He generally gets
79 bedridden about that time and I suppose it lasts four or five years maybe. There is no set rule. A traumatic injury is one produced by external violent means, such as a blow, cut, gunshot wound, any external means producing injury to the tissue.

Plaintiff rests.

The defendant offered the following evidence:

Dr. JOHN DUNN, a witness for the defendant, having been duly sworn, testifies as follows:

Witness is qualified as an expert.

I live in Richmond, Va. I am a physician. I pay particular attention to branches of eye, ear, nose and throat. I have been practicing medicine about 25 years, perhaps a little more. I have had occasion to examine W. B. Tilghman. I have known Mr. Tilghman for a good many years, seeing him at intervals. His wife was a patient of mine at one time, for quite a good while. Since Captain Tilghman's accident I recall having seen him three times. The first time a few days after the accident was received. I don't recall the number of days. The second time was some weeks later, and the third time was a few weeks ago. I have not the exact dates of any of these visits. The first time was at the request of Dr. Hillsman, that I examine his ear to see if there were any external evidences of injury, and as I recall it, to see whether in my opinion Captain Tilghman

needed any surgical work done on the head. The second time Captain Tilghman was sent to me to see if I could do anything for his ear, and the third occasion Captain Tilghman came to me to get a letter from me stating his condition at that date. On the occasion of the first visit Captain Tilghman, I had been informed, had received an injury, and I found him very restless. I went into the case only so far as I felt that no operation was necessary, and
80 feel that he had received an injury of the left ear. He complained of some noises in that ear and some deafness. I did not make any very careful examination to determine how much deafness there was. I did not do that because in Captain Tilghman's then condition it would have been practically impossible for me to do so, but I felt from his description of his case and the injury to the ear was not a very serious one. In severe injuries of the inner ear—and I concluded that that portion of the ear was involved in Captain Tilghman's case—in severe injuries of the inner ear, the symptoms are different from those which Captain Tilghman described. That was my reason for concluding that the injury to the inner ear was not of the severest type. I examined this canal at the bottom of which lies the drum membrane. There was no evidence of any injury to the drum membrane. You can not see into the inner ear, and I had to take Captain Tilghman's word for the fact that he was deaf and the noises in the inner ear. That deafness and the noises in the inner ear is a symptom of disturbances in the inner ear, that part of the inner ear in which the nerve of hearing is disturbed. I saw Captain Tilghman next, as I recall, as I told you, some days or weeks after he left the hospital. He came to the office at the suggestion of Dr. Hillsman to see if I could do anything for his hearing. At that time I noticed that his pupils were contracted, and tried the test that is known as the patella reflex, that is, made him cross his legs and struck this ligament just below the knee cap. In a normal person such a blow produces a movement of the foot. That movement was absent in Captain Tilghman. That combination, the peculiar disturbance of the pupils and the absence of the patella reflex, made me believe that Captain Tilghman had some other troubles beside that of the ear, and I told Captain Tilghman that there was no treatment that I could give the ear that would be of sufficient advantage for him to come to me, and referred him back to Dr. Hillsman, and told him that I would communicate with Dr. Hillsman, which I did, calling Dr. Hillsman's attention
81 to these two symptoms. Some weeks ago Captain Tilghman came to see me to get a letter from me about the condition of his ear. I examined it and found that the hearing in his left ear for the ordinary tests that we make was—his hearing was not much impaired. I mean by that, this: In testing a person's hearing, one of the tests is that made by the tuning fork, and we have a series of tuning forks that we set in vibration and place before the person's ears who is being examined. Captain Tilghman told me that he could hear the vibrations of the low fork. He told me that he could hear the vibrations of the tuning fork of the middle register and told me that he could hear the fork of the high register, and could

also hear a watch some little distance from his ear, and where that is the case, the person's hearing is not—you would not say that the person was very deaf. A person's hearing may be different in that ear up to a certain point. He may be incapable of hearing a spoken voice, provided the speaker's voice is low and the speaker's enunciation is not distinct, but for the ordinary conversation of a—the deaf person can hear fairly well. I think you had an evidence of how much Captain Tilghman's hearing was impaired. I gave Captain Tilghman this letter, the exact wording of which I have forgotten. I do not know how much further either of the counsel for the plaintiff or the defendant wish me to go. I am glad to answer any question or give any explanation that may be asked. With normal hearing in one ear, and the condition that I found Captain Tilghman's left ear in, I think he would be able to follow any vocation in life that he wished to carry on. A man in that condition has good practical hearing. The impression left upon me was the noises in the ear were not severe. There certainly was no evidence of there being present the severe noises which we find in the severe injuries to the ear. I took that into consideration in reaching my conclusion. In my opinion, an injury to the skull cannot produce
82 locomotor ataxia. An injury to the brain cannot produce locomotor ataxia. The term punctate hemorrhage is applied to those conditions in which there are present the word "punctate" would give you an idea, very minute hemorrhage, very minute. Punctate hemorrhage cannot produce locomotor ataxia. In answering these questions as to what can be done and what can not be done, you must remember that they are my opinions, and I can not state these things absolutely and definitely, but these are opinions I have formed as the result of my study, and the result of my observation. I do not recall how soon after Captain Tilghman left the hospital before I saw him. It may have been as much as 3 or perhaps 6 weeks. I had no idea I was going to be examined at that time to be a witness in the case. I only went into Captain Tilghman's condition sufficiently to know whether treatment of the ear would be worth while, and referred Captain Tilghman back to Dr. Hillsman.

Cross-examination:

You can certainly find in some of the text books that traumatism can produce locomotor ataxia. Others do not believe it. The word "traumatism" means an injury. You find some writers who say that alcohol will produce locomotor ataxia and some say not. Trauma will not cause it. I do not believe that trauma or alcohol can produce it, but they can make worse a condition that already existed. If a man had a predisposition to locomotor ataxia, in my opinion an injury to the spinal cord but not to the brain would excite that condition. The spinal cord reaches to the brain, but neither alcohol nor trauma can produce locomotor ataxia; the locomotor ataxia was there in the beginning, and would have developed, although the condition in which the trauma or alcohol put the patient would precipitate, would bring about more rapidly, than it

otherwise would appear. I am familiar with Oslar, but not
83 with his opinions. They are forever changing, and they are getting nearer to the actual conditions. I knew Captain Tilghman before this injury. Apparently he was in a good condition, but I never considered him in a sound condition. I do not know whether or not Captain Tilghman had any clot upon the auditory nerves. My idea was this, if you will allow me to explain. There is a portion of the ear known as the inner ear. That portion of the ear is encased in a hard bony wall, and in those little conformations are distributed the ends of the auditory nerve. One portion of that nerve receives the sound waves, which are transmitted to the brain. It is through the introduction of those waves that we hear. Another portion of that inner ear has to do with our recognition of the position of our head. Now the injury to the first portion produces one of two things, some disturbances of the hearing, that is accompanied, or, I should say some disturbance of the hearing with the accompanying noises. Injury to the other portion produces vertigo. Captain Tilghman, as I recall it, gave no—did not mention the subject of vertigo. Therefore, I inferred that if his hearing was impaired, it was due to disturbances to the first portion of the inner ear, that to which the nerve of hearing was distributed. The hemorrhage, had it been at all a great one, and by that I mean as much as a quarter of a drop of blood in so small an area, the ear would have been almost totally deaf, and the noises would have been very severe, and he would have complained very greatly of them. That he complained only slightly, and that the deafness was not complete, I was obliged to infer that the injury was a slight one, as the history of the case has shown. He complained of noises in his ear. I don't recall treating him. I didn't treat him because he was under Dr. Hillsman's care. I turned him over to Dr. Hillsman for treatment for the simple hemorrhage in his inner ear. That treatment would be the treatment of his general health. The absorption of that blood could be done without any effect upon his gen-
84 eral health or condition. The proper treatment for the condition you found was building up the patient's general health, seeing that his bowels were kept in proper condition, that his food was regulated. And then the use of some absorbent. I would suggest iodide of potassium. I know Dr. Hillsman. He stands very high. Captain Tilghman's deafness has not gotten worse. I tested him only a few weeks ago. Captain Tilghman hears very well. There is a permanent injury there to this man's inner ear in my judgment. Locomotor ataxia is a term that is used to express the combination of symptoms that result from a chronic disturbance of certain portions of the spinal cord. My belief is that those disturbances result from the action of a certain toxin poison on that particular part of the spinal cord and that poison cannot be developed by a blow. The symptoms of locomotor ataxia are not demonstrably continuously progressive. Certain symptoms may appear, and as far as we are able to find out, other symptoms may not appear on top of that for a long period of time afterwards, many years at times.

J. L. WATSON, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

My headquarters are in Richmond. I work as relief agent for the Seaboard. I am connected with the movement of trains and also the Accounting Department. I am a telegraph operator. Have been since March 5, 1905. I was operator at Norlina in November, 1912. I was engaged in my duties as telegraph operator at Norlina on the morning of this accident. I remember getting orders that morning for train 84. I received the orders from the dispatcher at Richmond, J. D. Lanier. I received them over the telephone. The telephone had been in use to receive orders ever since I had been there.
85 I don't know how long before. Certainly as far back as May, I received the order over the phone and repeated it to the dispatcher, and he gave me the time o. k. on it. We receive the orders over the telephone. The dispatcher first rings you and then he rings the other operators that he wants, and if he wants to copy 31 order he tells you that and how many carbons he wants, or how many copies he wants you to make, and he sends the order like this. For instance the trains would meet at Norlina—

Q. Is that the order you received over the phone from the dispatcher that morning? (Witness identifies order received on morning of collision. Framed copy identified and marked Exhibit B. Office copy identified and marked Exhibit C. Both offered in evidence by the defendant.) This order is in my handwriting. My name is on it. Captain Tilghman's name is on it. I know his writing. I saw him write his name on this order. The dispatcher told me to copy 3 copies of 31. I got the pad of order blanks, that pad there *on* one like it, and we use carbon papers, and we have them already prepared, and they tell us how many to copy, and in this instance he said copy 3, and I got one with 2 carbons, so I could make 3 copies, and I copied the order as he sent it, and I repeated it as I had it. I copy it as he sends it. (Counsel hands witness a pad of paper.) That is the way the pads are fixed. I use a stylus. Sometimes use a pencil. I mean by a stylus there is no ink or black lead. Anything hard will make a mark through all the copies, through the top copy and the two lower copies. (Counsel hands witness a paper.) This is the bottom copy of the order delivered to No. 84 on the night of the accident. I gave the upper copies to the conductor, Captain Tilghman. He read the order. He came to the office and I handed him the pad with all 3 copies of the orders on it, and he signed it and I told the dispatcher "31, No. 23, signed Tilghman, No. 84." I saw Tilghman sign it. He wrote
86 his name one time and that put the signature on all 3 copies. He signed the same way I did. After I informed the dispatcher that Tilgham had signed it, the dispatcher gave me complete on it, and I put the time, 3:45 a. m. that means it is completed and ready for delivery. Before I write that, the conductor has signed his name to it. Then I tore the 2 top copies off and gave them to

the conductor and he read them over to me. He read it to me, "Order No. 9 is annulled. No. 84, engine 91, will meet No. 81, engine 93, at Granite." That is the way he read the order. The framed copy and office copy are offered in evidence by defendant and marked Exhibits "B" and "C." After I gave this copy to Captain Tilghman, (indicating the framed copy) I next saw it yesterday. After I gave Captain Tilghman the 2 top copies, I put the office copy on a file provided for that purpose. As soon as I heard the accident occurred, I went to the file and looked over it. This was the morning of the accident. I then put it in my pocket. I gave it to Superintendent Witt, about 12 o'clock at Norlina. This order reads: "Order No. 23, Norlina, N. C., 11-19-12. To No. 84 and Operator Order No. 9 is annulled. No. 84, engine 91, will meet No. 81, engine 93, at Granite." Granite is spelled G-r-a-n-i-t-e. That is the way we spell them when it is sent. It is signed by J. H. W., and there appears on it the following: "Repeated at 3:43 a. m. signed by Tilghman, train No. 84, made complete at 3:45 a. m., received by Operator Watson." The top copy would be plainer, and then the copies in rotation would be plainer. The office copy would be least plain. The framed order (Exhibit "B") is the second copy. I can tell that by the conductor's signature being written with carbon instead of pencil. When the dispatcher sends orders to us he spells the meeting points, and in that instance he said G-r-a-n-i-t-e, Granite, and when I repeated the order to him I spelled it out, not only for that point but all points. There is no rule requiring that you spell it after the order is complete.

87 We usually do, and I did in this instance. The dispatcher in some instances may not repeat it again, but in this instance he said Granite and I said Granite is right. Mr. Hawks was in the office when Tilghman got his order. Hawks is the ticket agent. I did not receive from the dispatcher or deliver to Captain Tilghman that night any order for the meeting point at Grandy. I did not give Captain Tilghman any other order for the meeting point of his train that night except this order shown here:

Cross-examination:

Both of these papers exhibited here have the name of Tilghman impressed upon them with carbon. Neither one of them has the name of Captain Tilghman written with pen or pencil. That is the only way that I can tell that this is the second copy. I could tell the top copy by being written with a pencil. I could not say whether I copied that order with a pencil or not; might have been a stylus. What has happened to the office copy since I parted with it I don't know. I folded it up and put it in my pocket.

Witness complies with the attorney's request and writes, "Order No. 9 is annulled. No. 84, engine 91, will meet No. 81, engine 93, at Granite," and signs it. The window was facing east. I don't remember seeing anybody with him. I didn't take any particular notice. Anybody could have come up to the outer edge of window. I don't remember seeing anybody. He was there about 3 to 5 minutes. I don't know just how long, I suppose about 3 minutes.

He was signing his orders. It didn't take him that long, but he signed his order and I got the complete. I called the dispatcher at Richmond. He was right there. Captain Tilghman read his order "Granite." I suppose about 15 minutes the wreck occurred. From the time he got his order, I suppose it was 15 minutes. He read it to me to meet at Granite, and in 15 minutes he ran by that place and got in the wreck. He did not read it "Grandy." I came from Seneca, Virginia. I worked for a number of railroads before going with the Seaboard Air Line. As soon as I first heard of this collision, I rushed right straight to my file
88 and took out the paper that was the copy of what Captain Tilghman had. If the officials had come in there to take charge of that office 5 minutes after this thing happened, they could not have found that paper, the copy of which I gave to Captain Tilghman, in the files. One of these stations, Granite, is in North Carolina, and the station Grandy is in Virginia. No. 81 and No. 84 always met where they were ordered to meet, but not always the place on the time table. The meet orders from time to time varied. Of course, had I put North Carolina after Granite, it could not have been mistaken for Grandy, Va., if it was read closely. A man would not have been likely to have made a mistake with the State on the order. If I had put Va., after Grandy, he would not have been likely to made a mistake. In taking these orders I had an arrangement to slip over the head. This (indicating) is what you call a stylus. It doesn't make a mark in drawing it across a piece of paper unless you put carbon under it. I could not say how many orders I took that night. I remember the order that was delivered to 84. I do not remember any of the rest of them; Mr. Hawks, the ticket agent, was in there in the office part of the night. He would leave the office at different times when he had to meet the passenger trains, and he had to be there for other causes. I don't know where he was at any particular time. I don't know where he was when Captain Tilghman was there. The first train after Captain Tilghman's train was No. 11, going south, toward Raleigh. He got to Norlina about 4:40. He didn't bring all of his train. Captain Tilghman's train was a first-class passenger train and handled baggage to and from points south by Norlina, or baggage from any point south of Norlina going toward Portsmouth would have to be taken off of that train at Norlina and rehandled there and placed over for the Portsmouth train. The window was about 3 feet high. I took this order from the files to be absolutely positive that I had all of the orders
89 I had for Captain Tilghman, and that I hadn't delivered any orders except those he was supposed to have gotten. I didn't place it back in the files for my own protection, to be sure it would not get lost. Upon the bottom copy, the office file, and this paper here, one of the copies I delivered to Captain Tilghman. There has been no word erased or put on that since I delivered them to Captain Tilghman, except where it was wet, and there is some you can not read. That is just the effect of the damage. That is in

exactly the condition as when I delivered it, except the damage. (Counsel shows witness a pad of paper.) That is the kind of paper I was using that night. That (indicating) is what is known as the first copy. And that (indicating) is the second copy. And that (indicating) would be my office copy. That's the manner in which that order was made by me that night. I made all 3 copies at one time, and all were signed my Tilghman by signing his name one time. The dispatcher would ring Norlina, and after he had gotten Norlina he would ring the other point he would want. He would ring them one at the time. He could not ring them all at the same time. He would get them before he sent any order. That night I heard him address the operator at La Crosse, but whether it was La Crosse that was there, I could not say. I wasn't there. I heard him talk with some one else. I heard him tell La Crosse to copy 19 and make 3 copies, and he told me to copy 31 and make 3 copies, and he addressed my copy to me and 84 and the other to the operator at La Crosse he addressed it to 81 and the operator. The orders were exactly alike, all except the address.

Q. Did you state what you heard the dispatcher say to the operator at La Crosse?

A. I stated part of it.

Q. What was the order that you heard?

Objection by plaintiff. Objection sustained. Exception by defendant.

Exception No. 19.

90 Q. I ask you this. Wasn't it exactly the same order that was given to Norlina?

Objection by plaintiff. Objection sustained. Exception by defendant.

Exception No. 20.

Recross-examination:

I don't know how many men were on the wire. Only one man was talking at the time. They were talking back and forth. A freight train was to meet at Granite. That freight train was standing on the siding at Granite at the time this train 84 went by.

Redirect examination:

I had nothing for Grandy. I had a wait order for the freight train at Granite. It wasn't a meet order.

Recross examination:

I had an order for 84 to wait at Granite for a freight. It wasn't delivered because the time was up. That came before this order introduced in evidence here. The one that said pass a train at Granite I got first, the one that said wait. Captain Tilghman's train being northbound, it would have had a clear track at Granite.

No. 81 would have taken the siding. I had an order for 84 to wait there at Granite for a freight train. I had an order for 84 to wait at Granite. If the freight train was standing at Granite when the passenger train 84 got there, it would not have waited. So far as that order was concerned, Captain Tilghman ought not to have waited under that but gone right on. I did not deliver that order because the time was up. At the time Captain Tilghman came to my window to get his order, I had an order which told him to wait at Granite, but the time had elapsed. When he came
91 to my window, I ignored the order to stop at Granite and didn't give it to him. He didn't know anything about it.

Redirect examination:

The only order that would affect the running of Tilghman's trains by Granite that he got at all was the only one delivered, and that was the one to meet 81 at Granite, and the one to run 40 minutes late to Acca. They were the only two orders which affected his movement at all.

We had an order that 84 would wait at Granite until 3:40 for No. 11, a freight train. It was 3:43 before I was delivering the order to Captain Tilghman and, therefore, it was no use to deliver the order for Captain Tilghman to wait until 3:40 when it was 3:43 when I delivered the order.

JOHN D. LANIER, a witness for defendant, having been duly sworn, testifies as follows:

Direct examination:

I live at Richmond. I am train dispatcher and was so employed in November, 1912. I recall transmitting over the phone orders to Norlina on that morning in regard to the meeting place of trains 84 and 81. No. 84 was a northbound passenger train, and he had the right of track by the time-card. Train 81 was a south-bound passenger train, and 84 being a little late, it was necessary to give them an order to meet at some point in order to keep 81 from waiting so long before 84 came, so I placed an order at Norlina for No. 84 to meet 81 at Granite, and I placed the same order at La Crosse for No. 81, the same order at the same time. This order was given Operator Watson at Norlina, and Perkinson at La Crosse. It was transmitted to Watson on the telephone, and while being transmitted he copied the order, and then repeated it to me,
92 and I checked after him to see that he had every word correct. When I transmitted that order, I spelled the name out distinctly, G-r-a-n-i-t-e. It was repeated, first pronounced and then spelled, G-r-a-n-i-t-e. After the conductor signs an order, the dispatcher knows then that the conductor has the order, and it is made complete. The conductor signed the order on this occasion. I didn't see it but the operator told me that night. After he had announced to me that the conductor has signed, I told him the order was complete and gave him the time. After it was complete

I called to Watson as I gave him the complete and said, You have got that Granite, and he said, Yes, Granite. That is not done in all cases, but where there is any possibility of a doubt, I always take that precaution to inquire if the correct meeting point has been written down and read. The duties of my position are to direct the movements of trains by special orders and keep record of movements of trains. I have the record in which I kept this order. I entered the record at the same time I transmitted the order. This is the record. (Witness identifies record book of train orders Counsel states that they will offer in evidence this particular order, and any other in the record book relating to Captain Tilghman's train.) The order in this book that has been testified to here, ordering No. 84 and 81 to meet at Granite, is in my handwriting. There was one more order put out prior to this one, but it was later found necessary to make a change and I annulled it. That is order No. 9, specified in this order. The meeting point fixed was Hagood, Va.

Cross-examination:

Train No. 84 at 3:45 a. m. on the 19th was at Norlina. It passed Kittrell at 2:44. It must have been three-quarters of a mile north of Kittrell at 2:45. Kittrell is 23½ miles from Norlina. Train No. 84 got to Norlina at 3:35. It was due to arrive at Norlina
93 2:25. I sent this dispatch No. 23 to Norlina at 3:43, probably I sent it a minute or two before that, but that was when the operator repeated it. Probably I started to send it a minute or two berore that, 3:41. 3:43 is the time the operator was given the order, the time he finished repeating. I started at 3:41, finished at 3:43, that was 13 minutes after Captain Tilghman's train got to Norlina. Order 9 was annulled, that wasn't delivered to Conductor Tilghman. He had been at Norlina 13 minutes and the agent had an order for him and had held it 13 minutes and had not delivered it to him. Conductor Shannonhouse was on No. 81. That was a 19 order for No. 81 and Conductor did not have to sign it. No. 81 was given a 19 order, and 84 was given a 31. 84 had to sign this order because I wanted to know that he got this order. 81 would have had to stand still in the sidetrack at Hagood or somewhere, and consequently he could only advance by having this 19 order. When 81 came to La Crosse, there was no block office at Hagood. I had to give him an order, and so I gave him this 19 order. Conductors don't have to sign 19 orders, because if they don't get the order there is no danger of collision, there is just a delay. He could not advance on a superior train. It was the business of 81 to have kept out of the way of 84, unless he had an order to run past 84. There is no entry showing that No. 81 received the order, but he could not have advanced beyond Hagood unless he had received it. The station of Granite has been changed to Paschall. It has not been a year since it was changed. (Witness identifies Rule Book of Seaboard Air Line Railway.) It was the duty of the operator at La Crosse upon receiving this meet order, to deliver it to No. 81, and report the trains going by to me. I would keep

record of that. I would keep a record of the time it passed. He would keep a copy of the order and put it on his file.

94 Redirect examination:

My records show that Captain Tilghman's train got to Norlina at 3:35. The order was completed at 3:45. That was something like ten minutes after the train had arrived, when they were signed by the conductor. It consumed about two minutes in giving and repeating the order. 84 and 32 were northbound trains, and were superior trains, and in giving them—those two trains—orders to meet southbound trains, we give them what is called form 31 orders, and this is the order we require the conductors to sign and when he signs the order I give him complete and the operator tells me when he signs and I give the operator the time to write complete on the order. The order is ready for execution, and the conductor takes it and goes on with his train. This order given No. 84 at Norlina was a form 31 order; being that he was a northbound train and the ruling train, I gave him a 31 order at Norlina and required him to sign it so I would be sure that he got the order. The conductor of 84 signs this order at Norlina, and the southbound train, being the inferior train, at La Crosse, I gave him a form 19 order—which he is not required to sign. The order was the same but the form was different. (Witness identifies Forms 19 and 31.) The order I delivered to Mr. Perkinson was copy of the order right here, I read to the jury, both 31 and 19 were transmitted to Norlina and La Crosse at the same time.

L. W. PERKINSON, a witness for the defendant, having been duly sworn, testifies as follows:

I am a telegraph operator for the Seaboard at Paschall, N. C. I worked the third trick at La Crosse, Va. I have been an operator 8½ years. I was at La Crosse on the morning of the 19th of November, 1912. I received an order for train 81. I delivered the order to Capt. Shannonhouse, conductor on No. 81. It was No. 23, addressed to train 81, La Crosse. I have a copy of the order.

95 (Witness hands counsel a paper. Same is offered in evidence and marked Exhibit "D.") That is an exact copy of the order I delivered to the conductor on train No. 81. That is a 19 order. It was written with an indelible pencil and 3 carbons, 2 orders delivered to the conductor and he delivered one to the engineer, and I kept one. I got this order from the dispatcher at Richmond and I copied it down. Operator Watson at Norlina was on the line. I took this at the same time Operator Watson took other order at Norlina. I heard the operator at Norlina. This order is in my handwriting. I wrote all of it on the morning of the 19th. I got this copy from Captain Shannonhouse. That is the same copy I delivered to the conductor. I heard the operator at Norlina repeat the same order which was addressed to 84 at Norlina. He repeated it as I had it, all except the address. That order (indicating form 19) is addressed to the southbound train, and the

order at Norlina had the same number 23, and was addressed to 84 and the operator, and the other is the same as that. (Points at order form 19.) I heard the operator at Norlina read this message.

Cross-examination:

I did not know the operator personally at that time. I knew his voice. I recognized the voice that had been working the same shift. I suppose I was on the wire about two minutes receiving that order. It was about 3 minutes before it was ready for delivery. The operator at Norlina was on the wire about half that long. I knew he was there. The last time I saw this order was when I delivered it to Captain Shannonhouse. That was on the 19th of November, 1912. I have not seen it since, until today. It has been out of my possession all of that time. My copy is in my pocket. It is very dim and you can not tell much from it. (Witness hands counsel the paper taken from his pocket.) I have carried it in my pocket
96 ever since that time in my card case. It is almost illegible. It is rubbed off some. Carbon will not rub off much. It was folded up in my card case. It has just rubbed against the paper and a letter. This copy here was written with an indelible pencil, on top of carbon. If it gets damp it will change color. This copy I took out of my pocket, which I say was my office copy, has not had anything done to it since it was received that I know of. So far as I can tell there is a hole right there. I suppose it was where I put it on my file. If it had been made with the indelible pencil, it would have been made on there. You see when I tore it off something may have struck it. It was bound to have been made since I wrote that copy and gave it to Conductor Shannonhouse. There is no sign of a dot or anything like a dot above the last word, which appears to be Grandy or Granite, on the form which Captain Shannonhouse had. Nothing that could be taken for a dot. (This last carbon copy produced by Mr. Perkinson is marked as Exhibit "E" and offered by the defendant.) Neither one of those papers that the jury have just examined were delivered to Captain Tilghman.

Redirect examination:

I got this order from the dispatcher, Mr. Lanier, on that morning. He was in Richmond. I asked Captain Shannonhouse for his copy because mine was so dim. I put mine in my pocket the morning of the accident, and it wasn't called for, and it stayed in my card case about 2 years, and it was so dim I thought I had better get his copy of the order. That is a copy of the same order made at the same *same order. That is a copy of the same order made at the same* time. That is either the first or second, and mine is the third copy.

97 W. W. RYDER, a witness for the defendant, having been duly sworn, testifies as follows:

I live in Chicago. I am General Manager of the Western Union Telegraph Company. I was Superintendent of Telegraph of the

Chicago, Burlington and Quincy Railroad from 1903 until 1910, then for the following two years I was General Superintendent of Telegraph of the New York Central Lines west of Buffalo, on which roads I had a great deal to do with the installation of telephones for train dispatching. Leaving the New York Central I went with the Western Union as Manager of the Railway Department in New York and was there a year and a quarter. I am familiar with the telephone system for communicating train orders. That system is approved and in general use and has been endorsed by the American Railway Association, and by other minor organizations, and is in use on more than one-third of the entire mileage in this country at the present time; to be more exact, 33 per cent. The first application in a general way was made in the fall of 1906, but was used as early as 1883 in a small way. The growth in use has been since it was installed in 1906.

Cross-examination:

I do not know very much about the block system on railroads. The telephone could be used very well in connection with the block system, but on the roads I have been connected with the block system was under separate departments. The non-automatic block is in use on about 68,000 miles out of 214,000 at the present time. That is little more than a quarter of the entire mileage. The block system is not in use on 90 per cent. of the roads. The block system is recognized as a means of safety.

98 W. D. CARLYLE, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I was at the wreck at Granite on the morning of the 19th of November. I am an employee of the Seaboard now, and was at that time. I am telephone and block inspector. I was present when Mr. Beckham's body was found. His body was taken to an old passenger car we had there. I examined his pockets for everything he had on his person. I found a bunch of orders in his pocket. I found an order relating to the meeting point of train 84 and train 81. I took that order out of his pocket. (Counsel exhibits to witness copy of the framed order.) That is the order I removed from Engineman Beckham's pocket. His clothing was all wet and covered with coal. This order was all wet. I turned it over to Mr. Moore, and he turned it over to Mr. Bissett. Mr. Moore is an engineer on passenger train between Portsmouth and Raleigh. (Holds up framed copy of the order.) That is the order.

Cross-examination:

Engineer Beckham ran a first-class passenger train. I went to the wreck on the first train after No. 41 ran. We went out on a special from Norlina. Somewhere about 2 o'clock in the evening of the 19th. The accident happened in the very early morning

somewhere about 4 o'clock. I did not get there until nearly 12 hours afterwards. There was a great crowd there, looking over the debris and everything else, and poking around into things like curious people will. I didn't examine the order I found. Could not see, it was so wet. I saw this order that night when we got it pasted out, possibly 9 o'clock. It was after supper.

99 WALTER MOORE, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I am an engineer on the Seaboard. I live at Portsmouth. I am a passenger engineer. I was in the service of the Seaboard in November, 1912. I went down to the point of the collision between 81 and 84. I was there on the afternoon of the 19th when Engineer Beckham's body was found. I was there on account of the close relationship between my wife and his wife and the friendship which had existed between he and I. I was there when the order was taken from Mr. Beckham's pocket. I saw a bunch of orders taken from his pocket. I only recall order No. 23, fixing meeting point between 81 and 84. I did not examine any except order 23. (Counsel shows witness the framed copy of order.) That is the order I saw after being removed from his body. I read it after it was removed from his body. I read the name of the meeting point "Granite."

Cross-examination:

(Counsel for plaintiff exhibits framed copy of order to witness). There is not a "y" at the end of that order. That is continuation of the "e." A man would do that by the manner of his writing. I would not have to guess at it, not if I was running on it. I knew Captain Tilghman before this wreck very well. He made his first time—the first night he ever worked for the company he worked with me on the Portsmouth yard. Before this injury he was always a little slow in getting around. I don't know whether I could judge a man's physical appearance or not. Engineer Beckham was an educated man.

100 J. R. BISSETT, a witness for the defendant, having been duly sworn, testifies as fololws:

Direct examination:

I live at Raleigh. I am Master Mechanic for the Seaboard. I went down to the wreck that afternoon. I was there when Mr. Beckham's body was found. I was present when they removed his orders, watch, knife, and keys, etc. I read the order fixing the meeting point in about ten minutes after it was removed. It said order No. 9 was annulled, train 84, engine 91, and train 81, engine 93, would meet at Granite. He had 2 or 3 other orders in there. The other order was with reference to running 40 minutes late. (Exhibits framed copy order to witness.) That is the order that was removed from Mr. Beckham's body.

Cross-examination:

(Counsel for plaintiff holds framed copy up before witness). "Granite" is the way the word is written out. There is no dot over the "i." I have seen an "i" without a dot over it. There is no dot there. The "e" turns down a little, about 3-16 of an inch. There is a cross on that "t" the way I write a "t." There is no separate cross to the "t." It doesn't look more like Grandy than Granite, because it reads Granite. (Witness writes Granite.) There is no curve on the "e," because I don't write that way. I did not write that order. You asked me for my handwriting.

L. W. RENN, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live in Norfolk, Va. I lived in Raleigh about 40 years before going to Portsmouth. I have been in the service of the Sea-
101 board 47 years, I reckon. I ran trains as conductor about 36 or 37 years. I am now a passenger conductor and was in 1912. On November 19, 1912, I was running trains 32 and 33, Portsmouth to Norlina and back. I would go up to Norlina and come back to Portsmouth. My train would turn around the same night or morning; I came up usually between 2 and 5 o'clock A. M. My train was there when 84 came in. My train was turned around at Norlina that morning. When I have my train turned around it is necessary for it to occupy the main line between Norlina and Richmond. In order that I would not detain trains 81 and 84 on the main line as I was going around the "Y," it was necessary for me to know something about where they would meet. On the morning of November 19th, I went in the office at Norlina to get information and saw an order on the table. I went there and read the order, simply read the meeting point of 81 and 84. I read it Granite. I used that information in turning my train around the "Y." When I came out of the office I said to the engineer that 81 and 84 were going to meet at Granite, that we must follow 84 closely around so that we could get out of the way of 81. My train was moved around the "Y."

Cross-examination:

I would not know the order I saw there if I were to see it now. It was a pretty plain order, written plain. I saw the copy before it was delivered, the top copy of the three. I did not see the office copy. I don't think 84 was there, but they came in very soon. I could not give you the time. It was after 3 o'clock. I don't think it was as late as 3:40. It may have been just as the train was coming in, or a little before. I could not tell you to save my life. I did not notice the date on this order. I am 63 years old and still a conductor. I cannot say the word was plainly written Granite, but
102 I could read it Granite. I don't think I could have read it anything else. It was a few minutes before 84 reached there,

either that or it was coming in. I don't think it had gotten up to its stopping place. I have known Captain Tilghman quite a number of years. Before he was injured in this wreck, I think he had a very fine physique. Physicaly he looked to me like a well man. As far as I know his general character is good.

Redirect examination:

In case of doubt by a conductor the rules say take the safe course. If he had any doubt as to the meeting point fixed in a train order as between these two stations mentioned, his duty would be to stop at the first station and I would say confer with the engineer and if possible ascertain from the dispatcher what was correct.

Recross-examination:

The engineer had to read the order to the conductor first. He first construes the order. Afterwards, the conductor reads it to the baggagemaster. And the first train construction is on the engineer. If there is no doubt it is his duty then to proceed to the meeting point as he understands it in the order.

Redirect examination:

That first order read by the conductor to the operator.

Recross-examination:

It is the duty of the operator, if it is not correctly read, to inform the conductor.

103 J. R. TUDOR, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live in Raleigh. I am engineer on Seaboard Air Line Railway. On the morning of the 19th of November, 1912, I was employed at Norlina as hostler. I handled the engines around the Norlina terminus, and handled the engines around the "Y." I handled the coaches from Capt. Renn's train and an engine of a train from Richmond. It was my duty to go on the main line to turn his cars. I saw Captain Renn that morning. I am the engineer that Captain Renn had the conversation with. He said 84 and 81 would meet at Granite and we ought to go out and follow 84 close. I followed 84 close right after Captain Renn told me that.

Cross-examination.

No. 84 had arrived and was taking water. 84 had gotten to the water tank, just south of the station, 2 or 3 car lengths. Probably about, I guess 25 to 30 yards. The engine had gotten to the water tank and was taking water. It had gotten there and the fireman had the spout taking water at the time he told me. I saw the engineer.

C. E. MATTHEWS, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live at Raleigh, N. C. I am a conductor on the Seaboard. This is my fifteenth year. I was on a train on the morning of November 19th*at* that carried the passengers from the wreck near Norlina to Richmond. I took the passengers at Norlina. Captain Tilghman was on that train. He told me his order was in his pocket. If a conductor has a doubt as to the meeting point fixed by the train order for his train it is his duty to stop at the first station and
104 have it corrected or straightened out, to satisfy himself that he was right. When he reached one of the stations about which he was in doubt it would be his duty to stop. I have been in Columbia with Captain Tilghman several times. I have seen him take a drink. I could not say how many times I have seen him drinking. I only saw him the first three months in the year. I have seen him drinking during that time several times. I had a conversation with Tilghman about drinking on one occasion. An engineer friend of Captain Tilghman said he was drinking too much. I told him he had better cut it out, and he said that the railroad would be better off if everybody attended to their own business, so I did not say anything more to him about it.

Cross-examination:

That conversation was at Columbia Hotel, Columbia, S. C. I would say in the afternoon. I do not know it was in the afternoon, but when I went in there on the train I was running I slept in the forenoon and got up for dinner, and we usually saw each other in the afternoon. I drink some times. I was taking care of myself and Tilghman was drinking to excess. He was laid off duty.

Redirect examination:

I felt it was my duty to warn Tilghman against his wrong doing as a member of the Brotherhood and as an officer of the Brotherhood.

W. E. HALL, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live in South Carolina, Kershaw County. Am in store
105 business. I was a passenger on Captain Tilghman's train on one occasion, going to the town of Shepard. I think he was drinking at that time. He looked to me like he was pretty well tanked up.

Cross-examination:

That was in 1911. I boarded the train at Cassatt, and was going to Shepard. It was seven miles.

F. A. POLSON, a witness for the defendant, having been duly sworn testifies as follows:

Direct examination:

I live in Kershaw County, State of South Carolina. I am not connected in anyway with the Seaboard Air Line Railroad. I am a farmer. I was a passenger on the train at the time Mr. Hall related while on the stand. I saw Captain Tilghman that night. He was the conductor on that train, and came around to get our tickets. It seemed to me that he was pretty tight. It was the 16th night of August, year 1911. He carried us beyond the station at Shepard 5 miles.

W. P. CLEMENTS, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live in Raleigh. I am conductor on the Seaboard and have been a conductor for 25 years. I have [seen] W. B. Tilghman under the influence of intoxicating liquors one time in Columbia. In front of the Columbia Hotel. He was going in and I was coming out. He was staggering. That was in February, 1911. It is the duty of a conductor in case of doubt to take the safe side and run no risk. If a conductor should get an order fixing a meeting place and he was in doubt about the meeting point, it would be his duty to stop
106 immediately. If the conductor should reach one of the points that created the doubt, it would be his duty to stop there and find out.

Cross-examination:

If a conductor had no doubt about the meeting point, he would go ahead to the meeting point. If a conductor left Norlina and was running a northbound train, a train of superior rights, and had no doubt that the order was Grandy, he would go to Grandy. The first station north of Norlina is Wise. It is about 3 miles from Norlina. No night agent there. The next station was Granite, at that time. That is about 4 miles from Wise. No night agent there at that time. That station is called Paschall now. The next station north of that is Bracey, Va. That is about 5 miles from Granite. That telegraph office is not open at night. The next station is pass track at Hagood, about 4 miles from Bracey. No night telegraph office there at that time. From Hagood to the next station north, La Crosse, is about 6 miles. There was a night operator at La Crosse. Next station is Skelton, about 5 miles. That station was not open at night at that time. From Skelton to Grandy I suppose it is about 5 miles. No night operator at Grandy, that I know of. That is in the State of Virginia. It is 24 or 25 miles from Granite to Grandy.

S. E. BURNS, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live at Cayce, S. C. I am in the employ of the Seaboard Air Line. I was at Hamlet on the morning of January 27th, 1912. I saw Captain Tilghman there on that morning. He was in charge of a train. I saw him in the register room, adjoining the telegraph office, Hamlet passenger station. I afterwards made a statement about this to the superintendent.

107 Cross-examination:

I was freight conductor. I was called on for the report by Superintendent Gore. Captain Tilghman staggered when he walked. I did not see him catch his train. It was standing still. That was between 12 and 6 o'clock in the morning. I don't remember exactly the hour.

J. P. WYATT, a witness for the defendant, having been duly sworn, testified as follows:

Direct examination:

I live in Columbia, S. C. I have been an engineer for 12 years on the Seaboard. I pulled the train on which Captain Tilghman was conductor on January 27, 1912. I saw Captain Tilghman that morning. He was drinking. I have seen him on other occasions when he was apparently intoxicated.

Cross-examination:

I have seen him apparently intoxicated in Columbia along in January, 1912.

W. A. GORE, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live at Hamlet and am superintendent of a division of the Seaboard, from Raleigh to Cayce and Wilmington to Rutherfordton. Captain W. B. Tilghman was running on that division in February, 1912, January and February. I held an investigation in the question of Captain Tilghman's being drunk on duty. I talked with Engineer Wyatt about that matter, and he made a statement that Captain Tilghman was under the influence of something, that he was not himself, and he appeared to be intoxicated at Hamlet.

108 Mr. S. E. Burns said he was intoxicated. He saw him in the telegraph office at Hamlet and he was intoxicated. I had a conversation with Mr. W. B. Tilghman about that. He came to my office, and I told him what he was accused of, and he said he was not drinking. I told him that these men all said he was, and asked him to face them, and he said his word was not any good

between the three, and then I asked him if he had been drinking at all that day before going out, and my recollection is that he told me that he had had a drink that afternoon, before he went out some hours or so, several hours before he went out. He told me afterward that he never intended to take another drink as long as he lived. He was removed from the service and kept out of the service for several weeks or months. I don't recall just exactly how long.

Dr. A. S. PENDLETON, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

The Court holds, upon proper evidence that Dr. Pendleton is an expert.

I am clinical pathologist for the State Hospital at Dix Hill. The duties are to examine pathological specimens, to hold post-mortems, to examine chemically and bacteriologically specimens of the urine, to examine specimens, microscopically and serologically, of blood, to examine microscopically and chemically specimens of sputum, or any other secretions or excretions of the body, and further to make physical examinations of all new cases that are brought to the hospital. That brings before me the disease of locomotor ataxia. I have license in this State and have complied with all of the laws. I think that my experience and reading will enable me to express an opinion upon the matters relative to the disease of locomotor ataxia. Locomotor ataxia is a combination of symptoms that are a late manifestation of
syphilis that are characterized symptomatically by certain
109 sensory symptoms, by lightening pains in the limbs and in various parts of the body and certain sensory crises, the so-called gastric crisis, pain in the stomach. The effect pathologically is a degeneration and hardening of the posterior columns of the spinal cord and the posterior roots of the spinal nerves and the degeneration of the spinal ganglia. So far as we know, the hardening is due to the poison or toxin that is developed by the growth and multiplication of the organism that causes syphilis. An injury to the head cannot cause locomotor ataxia. An injury to the brain cannot cause locomotor ataxia. Punctate hemorrhages of the brain cannot cause locomotor ataxia. It would not be possible, in my opinion, for a blow on the left side of the head which produces a bruise, which heals of itself, whether accompanied or not accompanied by punctate hemorrhages, to cause locomotor ataxia. If the jury should find from the evidence the facts to be on the 19th of November, 1912, the plaintiff, W. B. Tilghman, was in a collision on the Seaboard Air Line Railway, and that his head was struck by some blunt object at a point above the ear, that the blow produced a little bruise, which healed of itself, that the plaintiff remained in a dazed condition for about a week, and left the hospital in about ten days and on January 6th, 1913, his attending physician found him able to resume his duties as a railway conductor, in my opinion the injury referred to could not cause locomotor ataxia. I don't see how it could.

Cross-examination:

Usually the first symptoms developing in locomotor ataxia is the so-called lightning pains, sharp shooting pains, and then next usually comes what is called the Argyll-Robertson pupil. The Argyll-Robertson pupil is supposed to be due to absorption and degeneration cause by this absorption of this toxin which is developed by the organism which causes syphilis. We don't know what causes the Argyll-Robertson pupil. I don't know how it
110 is done, but I think I know what does it. I think it is the same thing does it that produces locomotor ataxia. The sympathetic nerves governs the pupils more than the spinal cord. It is possible that the spinal cord governs the pupils to some extent. The centers of the eye are supposed to be in the floor of the fourth ventricle in the medulla oblongata. If you want the center for perception it is in the occipital lobes, if that is what you want. We do not know what causes the Argyll-Robertson. Osler's 1911 publication is out of date. What men who keep up with these things have found out yesterday, last week and last year is in date. I have felt it true for some years that locomotor ataxia could not be produced by traumatism. We would determine whether a man had syphilitic poison in him by going into the history of his case first, by obtaining a specimen of his blood. The blood test is usually spoken of as the Wasserman test. Personally I have performed about one thousand of these tests more or less, and I have never seen a triple plus Wassermann where it was possible future developments did not show that the patient had syphilis.

If I should suppose that Captain Tilghman up to the 19th of November, 1912, was a man in good health, and a fine specimen of manhood, that up to that time he had no objective symptoms or no symptoms discoverable by himself of locomotor ataxia, that on the 19th of November, 1912, he was thrown half the length of a passenger car, bruised all over, back and arms, and suffered a wound or bruise on the left side of his head, about an inch and a half above his ear, that he remained in a dazed condition after that something like 8 or 10 days, and seemed to recover, but immediately after that, soon after that, he developed symptoms of locomotor ataxia; suppose he should state that he never had had any symptoms whatever of syphilis, suppose upon a triple plus examination of his blood, a negative examination of his blood, no traces of syphilis developed, I would say that the locomotor ataxia could not be produced by that tra*mu*atic injury. The known facts in regard to the connec-
111 tion of syphilis and locomotor ataxia are changing so rapidly that any book that was published in German and translated into English would be out of date so far as that particular item would appear by the time it would get among the doctors for reading. I do not believe that alcohol can cause it.

Objection by defendant to evidence in the foregoing language. Objection overruled. Defendant excepts.

Exception No. 21.

Q. I ask you if the very best authorities, German and American,

up to the very time, now, don't hold that mental exertion, over exertion in any occupation, excitement and physical emotions, will produce locomotor ataxia?

Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 22.

A. A great many eminent authorities did hold that position some years ago. Even as short a time as 4 or 5 years ago. Even as short a time to the present as 2 or 2 and a half years ago. I could not give the exact time. Such eminent an authority as Dr. W. B. Spiller, Professor of Neurology at the University of Pennsylvania, holds to the contrary. Smythe-Elyjelliffe practically made the statement that trauma cannot produce locomotor ataxia, recently since the last few years, in a book published in 1909, that nothing but syphilis could cause it, I am not sure of the date. He practically made the statement even so far back as then. There is practically no authority that has been published, none of which I know, that has made the unequivocal statement that nothing but syphilis can cause locomotor ataxia except viva voce, so far as I know. I have read over casually some of it. The prevalence of syphilis and the prevalence of locomotor ataxia while they have something to do
112 do with each other, they have not everything. That is, all cases of syphilis do not have a following tendency to the development of locomotor ataxia, the more severe as a rule the first and secondary symptoms of syphilis are, the less apt they are to be followed by locomotor ataxia, and the milder the symptoms of syphilis are, the more apt to be followed by cerebral and spinal symptoms, and the locomotor ataxia comes under the spinal symptoms. Locomotor ataxia is a progressive disease. It has been divided into the pre-ataxia and the ataxic and the paralytic stages. The usual indications of the first stage are lightning pains, loss of the knee reflex, and the Argyll-Robertson pupil. If you find these symptoms they cannot be dormant. They may not progress very rapidly, they may progress slowly, but if you can find them, they are not dormant, they are there. The development of locomotor ataxia can be much slower in some stages than in others. I do not think it possible for a traumatic injury to bring into more active being symptoms of the first stage. We are beginning to get results in treatment. We treat it with salvarsan and mercury. We do not cure the hardened spine with that. We stop it where it is. We arrest it. It would be a question of opinion as to whether it is incurable. There has never been a case cured to my knowledge. We are beginning to see light, beginning to get results in the treatment. Abatement of symptoms, improvement of gait, stopping of the crises, and a tremendous diminution of the lightning pains. They have been gotten in some cases. There was such a case at the hospital, University of Pennsylvania, probably not over two years ago. I have never heard of him since. If this man had been cured of locomotor ataxia it would have been a thing known commonly among the profession in the medical centers.

Redirect examination:

The results of going over the history of the cases that have developed locomotor ataxia and the results of the Wassermann test
113 have all thrown new light upon the matter. I could not say definitely how long the Wassermann test has been in vogue, about 6 years, I think. There have been a great many improvements. Quite a large proportion of those who have syphilis are not aware of it. These authorities that I refer to as holding the opinion that an injury cannot produce locomotor ataxia, are eminent, recognized authorities in the medical profession. They stand among the first in the profession. The new discoveries in the diagnosis and treatment of diseases are usually published in pamphlet form or in magazines, usually spoken of as monographs.

The mild cases are more liable to cause locomotor ataxia than the severe ones. Syphilis can be gotten by heredity, by the use of a common drinking cup, by a cut in a barber shop, by the use of a water closet that is not carefully cleansed, by the use of a pipe that a person who has a chancre of the lip has used before, and in ways that they are examples. I am testifying as to the means by which it is gotten as much from my personal knowledge as from the books. I was thinking of cases in which it has happened in that way in my practice. They are common ways in which it is gotten. The text books and all authorities state that syphilis can be contracted in those ways.

Dr. ALBERT ANDERSON, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live in Raleigh. I am superintendent of the State Hospital at Dix Hill. Prior to that time I practiced medicine in Raleigh about a year, and for six years I held a position with the Jefferson Standard Life Insurance Company as Medical Director. Prior to that I lived in Wilson and practiced medicine there, 19 years. I have my license to practice in North Carolina. (The Court holds that the witness is an expert.) From my experience as a physician I
114 feel qualified to express an opinion upon questions relating to the disease of locomotor ataxia. The condition of the spinal cord in cases of locomotor ataxia is one of hardening. Specific cause is syphilis—the toxin, poison—the organism caused by the syphilis. In my opinion an injury to the head cannot cause locomotor ataxia. An injury to the brain cannot cause it. Punctate hemorrhages of the brain cannot cause it. A blow on the left side of the head which produces a bruise, which heals of itself, whether accompanied by punctate hemorrhages of the brain or not cannot cause locomotor ataxia in my opinion. If the jury should find as a fact from the evidence that on the 19th of November, 1912, the plaintiff, W. B. Tilghman, was in a collision on the Seaboard Air Line, and that his head was struck by some blunt object at a point above the ear, that the blow produced a little bruise which healed of itself, that the plaintiff remained in a dazed condition for about a week, and in

about ten days was able to leave the hospital, and on January 6th, 1913, his attending physician found him able to resume his duties as a railway conductor in my opinion the injury could not have produced locomotor ataxia.

Cross-examination:

That is my opinion. I think I know whether it could or not. I do not think that I am the only man in the world who does know what can or cannot produce locomotor ataxia. I got my opinion from reading standard authorities. White and Jelliffe, Strumbull. White and Jelliffe's book on Phychiatry say that locomotor ataxia cannot be produced by an injury. It came out this year. I suppose it was writen last. I suppose Strumbull's book was published in 1911 or 1912. He says that syphilis is the cause. When we find a man has the stabbing pains in different parts of the body and lower limbs and around the body, the trunk, and the girdle sensation—
sensation that draws a man around the body, and the absence
115 of reflexes, especially the patella—when you strike a man
right there (indicating just below the knee) if his reflxes are normal, his foot moves (illustrates). You see that. Mine is all right. And the pupils are what you call immobile. They do not reflect the light. Light has no effect. They do not reflect the light. Do not react the light, but the eye accommodates itself to distant objects. We call that the Argyll-Robertson pupil. There are a great many tests we find with the differeent organs for what is known as their crises, the stomach or gastric crisis, in becoming violently nauseated and severe pain in the bladder and may be first a little difficulty in voiding the water and later on may be severe pain in the rectum. Also may be too free in voiding the water. May be retention of the water in the bladder, and the later symptoms may be paralysis following the ataxic stage. When the paralysis stage comes on the patient is bedridden and soon passes away. If it is not properly treated, it ends in death sooner or later. I have never treated a case in my life that got well. It is a progressive disease. I had not thought of the gait. That is the most conspicuous symptom of the trouble. It is walking in a peculiar way, lifting the foot and putting it down in a peculiar way, what we call the incoordination of the muscles. That means the inability of the muscles to put the foot as it should in a normal condition. A man cannot go with his eyes hid. He must be conscious of walking, and must have the use of his eyes to guide his feet, which make this unsteady and peculiar gait. If I tested a man with the Rhomberg test and he had the swaying motion, and if I tested the pupil of his eye and it showed the Argyll-Robertson pupil, and I tested the patella reflex at his knee and his foot would not respond, I would say that he probably had locomotor ataxia. If he had the shooting pains in his legs in addition to these other symptoms, and had bladder trouble, and if he had lost as much as 40 or 50 pounds, that wouldn't confirm my opinion as final without examining the patient thoroughly. The
technical name of locomotor ataxia is wasting disease of the
116 back, tabes dorsalis. Tabes means wasting. The spinal
cord part gets hard. It ought to be soft. You never can

tell about the damage to the brain. A very slight injury may cause very serious results and a very serious damage may get well.

Q. If you hit a man on the head slightly above the ear here, and it impairs his hearing in that ear, and puts him in a dazed condition about ten days, and leaves his hearing permanently impaired, you would say that the blow produced serious results?

Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 23.

A. Well, if upon examination I saw that there was evidence of hemorrhage, upon examination of the drum or external ear, or inner ear, was damaged from certain symptoms found, I should think that he was permanently damaged in his hearing. It is owing to the findings that an expert would find upon his examination.

That would be a serious injury. The ear itself is made up of three parts, the outer ear, the middle and the inner. The inner ear has the receiving of sounds that transmits it to the brain.

Redirect examination:

I am not an ear specialist. Dr. Dunn is an ear specialist and his standing is very fine. I was asked if an injury could cause locomotor ataxia in one case could it not cause it in a thousand. It could not cause it in one case, in my opinion. If a man that received a slight injury to his head and was in a dazed condition about 8 or 10 days, and got up then and left the hospital, and then in less than sixty days was able to resume his duties as conductor, I would say the injury to his brain was very slight.

117 H. W. STANLEY, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live in Norfolk, Va. I am at present Second Assistant to the President of Seaboard Air Line Railway. In 1912, I was Assistant General Manager. I have been with the Seaboard something over 17 years. I went down to the scene of this wreck near Granite on the morning of November 19th. I left Portsmouth at 9:25 that morning and reached the scene of the accident between 2 and 3 o'clock, to the best of my recollection. I was not present when they removed the orders from Engineer Beckham's body. I read the orders removed from his body within 10 or 15 minutes after they were found. I saw an order taken from his body that related to the meeting point of 81 and 84. I think Mr. Bissett, the Master Mechanic, handed it to me. I was in a business car attached to a coach attached to a special train which was to take Mr. Beckham's body to Raleigh. (Counsel holds the framed copy up before the witness.) That is the order which was handed to me. I attempted to straighten it out and straightened it out between blotters on my desk, as it was very wet, and after drying it out in the presence of other employees in my business car we undertook to decipher it to see if the meeting

point was shown as Granite. I read that meeting point "Granite." That is the order that I straightened out. That is the order that was delivered to me just as it is now.

Cross-examination:

Together with that order several other orders and the personal effects of Mr. Beckham were placed in a car in which I was sitting at the time, having just left the scene of the accident when
118 Mr. Beckham's body was found, and this order was with several others together with Mr. Beckham's personal effects, and were brought into the car by Mr. Bisset and Mr. Carlyle, and I made a list of them in the presence of —. I only read those relating to this train. The other orders are probably in the possession of counsel. I delivered them to the General Claim Agent, together with that (indicating framed copy). I think the General Claim Agent put it in the frame. Something, card board, is at the back as a ground. The backing would aid in the reading of it, but I could put it on the floor and read it.

Redirect examination:

You could hold that order up and read it without any background. There was no other order I saw that referred to any meeting point between 84 and 81.

Recross-examination:

I saw all of the orders that came out of Beckham's overalls pocket, and all of the effects that came off his person. I saw all the train orders and effects that were delivered to me by Mr. Bissett. I cannot swear that that was all of the orders that was in his pocket. I could not swear that unless I had taken them out myself.

W. L. STANLEY, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I am General Claim Agent of the Seaboard Air Line Railway. I have held that position and similar positions for 13 years. I live in Norfolk, Va. I reached the scene of this accident on the evening of November 19th, 1912, between 2 and 3 o'clock. I was at the scene of the accident but not at the point where Beckham's body
119 was found. I received certain papers said to have been taken from his body. I received an order fixing the meeting point between 81 and 84. (Counsel exhibits framed copy of order to witness.) That is the order that I received. I had that order put on a piece of board and put in that frame. I read that order that night. I read the meeting point as Granite. I first saw that order the night of the accident, the night succeeding the accident. I received it 2 or 3 days afterwards at Portsmouth from Mr. H. W. Stanley. I received other orders with it at the same time. (Produces some pa-

pers.) I am giving you all of the papers that were handed over to me, regardless whether they were orders or not. That was the only order that related to the meeting point of 81 and 84. This order (referring to office copy) came to me through the Assistant General Manager. I do not recall the exact date; not at the same time the other one did.

T. T. HAWKS, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live in Norlina. I have been working there about 3 years. I was raised right near there. I was working for the Seaboard Air Line Railway on November 19, 1912, at Norlina, in the agent's office. I was at work on that morning. Mr. Watson was on duty that morning, as operator. I had a conversation with Mr. Watson on that morning after 84 left. I saw the office copy of the order he had for No. 84. I read it there that morning. Soon after 84 passed. After we heard of the collision. Mr. Watson got the order off the file. I saw him get it off. I read it as soon as he got it off the file. It read Granite. I read that word on it Granite.

120 W. T. PASCHALL, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live at Granite. At the time of this collision I was living about 300 yards of where I live now. I am in horse business and farming. I was living there at the time of the collision between 81 and 84. I went down to the collision that morning. I got down to the depot about three-quarters of an hour, I should say, after the collision. I went in the station. I saw the conductor of one of the trains in this collision. The man I was talking to I called him Captain Gibson. He said his name was Tilghman. In my opinion plaintiff is the man I was talking to. I went in there and he seemed to be cold and there was a man making up a fire, and directly he went into a chill, and I asked him if he did not want to go up to my house, and he said he wanted to stay around where they could get hold of him, and he got up on the table and commenced to groan, and I went up to the house and got some blankets and wrapped him up, and after he got quiet I was there and he asked me to send down to the wreck and get a grip and a gun, and possibly some one or two more packages, I can't say what else. I know his grip and gun were brought up, and after he got quiet I asked how the wreck occurred, and he said he thought it was Grandy and it was Granite. He did not mention his orders while I was in there.

Cross-examination:

He said he thought it was Grandy but it was Granite. He was at Granite. He was in bad shape that morning. I don't know what

condition his mind was in then when he was mumbling and grunting and groaning. I did not know that he had been hurt on the head.

He was cold and nervous. After the doctors got there I went
121 away. There were some doctors staying up there with us.

I don't know. I saw him pull some papers out of his pocket and he put them back. I did not see any loose.

C. C. COLEMAN, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live at Granite. It has been changed to Paschall. I am a farmer. I was living at Granite on the morning of this collision. I went down to the collision. I went in the station. I saw the man lying there on the table, and I asked them who was up there. I had only seen him once or twice. He was lying on the table in the office with blankets on him. I saw the man's face. I think the plaintiff is the man I saw. I asked him if there was anything I could do for him, and he said "No," and I wanted to take him over to my house, and he said, "No, I am getting along very well." I said, "Isn't there anything I can do for you?" and I told him wouldn't he like a little whiskey, wouldn't a little whiskey help you? and he said, "No, I don't drink and I don't want any, and he said, "I would like to have a cup of coffee," and I got it, and he said, "I wish you would go down to the wreck; have you been down there?" and I said, "No," and he said, "Go down and bring me the grip and gun in the baggage room." And when I got back the Captain seemed to be resting freer, and when I got back he asked me who was dead, and I said, "I don't know," and I asked him how the wreck happened, and he said they must have overlooked the order, and he said, "I had started into the baggage room when it happened. I was standing about the baggage car door, and when they went together it knocked me right out." He stated that he had started in there to see the baggagemaster to read the order over again.

122 Cross-examination:

He said they must have overlooked the order. I don't know that he was referring to the other train. He said they. I thought he meant they, him and the engineer. When he said "they" he meant someone out of his own company.

Redirect examination:

He said if it had been a minute later it would not have happened after he started in the baggage car.

M. J. HAWKINS and H. B. HUNTER, witnesses for the defendant, having been duly sworn, testified to the good character of Wallace Paschall and C. C. Coleman.

T. F. MARROW, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I live at Townsville, N. C. I have seen Captain Tilghman twice in an intoxicated condition on his train.

Cross-examination:

It was somewhere between Raleigh and Norlina on the first instance. Between midnight, I think, and day, somewhere like that. I could not specify the time because sometimes the trains were a little late. I don't know what month and year, possibly 3 or 4 years ago. I knew him at that time when I saw him, "Yes." The other time I saw him and thought he was under the influence of whiskey was later on, I don't recall just when. I would not swear just exactly the month *of* period, but I—I don't recall those circumstances. It was an incident that came up. The best of my recollection, as I understand it, it was either 1910 or 1911, as I understand it. As I recall it, it was 1910 or 1911.

123 C. G. SHANNONHOUSE, a witness for the defendant, having been duly sworn, testifies as follows:

Direct examination:

I am a conductor on the Seaboard and have been employed as a conductor about 34 years. I was a conductor on November 19, 1912, on train 81. I think we left Richmond about one o'clock or 1:15 A. M. I got an order to meet No. 84. I got two orders. I got the first at McKenney to meet at Hagood, order No. 9, a 19 order, and at La Crosse I got another order annulling No. 9 and to meet them at Granite. (Counsel hands witness a paper.) That is the order I got at La Crosse. That copy has been in my pocket since I got it November 19, 1912. I proceeded under that order.

Cross-examination:

I have known W. B. Tilghman quite a number of years. His general character is good. He has fallen off 40 or 50 pounds, I should judge. I do not see any change in him in any other respect, except he looks thinner than he did. He seems to be hard of hearing. I never noticed it before. I had 19 order to meet Tilghman's train at Granite.

Redirect examination:

I suppose I would have met 32 at Manson or Middleburg, south of Norlina.

Recross-examination:

I was between 5 and 10 minutes late. Our regular meeting point was at Skelton. To run from Skelton to Granite would take 26

to 28 minutes. 84 was an hour behind when I met them. It was between 15 or 25 minutes after the wreck when I first saw Tilghman.

Q. What did he say, if anything?

124 Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 24.

A. I came up to him and I said, Tilly, where are your orders, and he raised his hand like that (illustrates) and he said, Go ahead, Beckham, go to Grandy. I said Beckham is dead or somewhere, and he said, I am going back to flag, and went immediately back. That is all the conversation that passed between us.

Recross-examination:

He did not answer me when I said, where are your orders?

The defendant rests.

Dr. B. L. HILLSMAN, a witness for the plaintiff, having been duly sworn, testifies as follows:

Direct examination:

I am the same gentleman whose deposition was read here. I live in Richmond. (It is admitted that the witness is an expert.) I have known Captain Tilghman 8 or 10 years. I treated him after this injury in the wreck. He lived right opposite me on Park Avenue, about 6 years.

Objection by defendant to the entire examination of this witness upon the ground that his deposition has been read in evidence. The court in its discretion allowed this evidence on behalf of the plaintiff. Objection overruled. Defendant excepts.

Exception No. 25.

I have never seen Captain Tilghman intoxicated. I examined him today.

Q. Describe what you found his condition to be?

Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 26.

125 A. I examined Captain Tilghman this morning, and found him with all the cardinal symptoms of locomotor ataxia, Argyll-Robertson pupil, Rhomburg symptoms, shooting pains, ataxic gait, a kind of the shuffling of the feet along, and analgesia loss of pain sensations in the lower limbs partially. I can take a pin and stick it in up to the hub in Captain T-lghman's lower limbs and cause no pain. All of the cardinal symptoms—absence of the patella reflex absolutely. I gave him the Rhomburg test. The Rhomburb test is to put the patient's heels together, toes outward, close the eyes, and it is the swaying motion, backward and forward, and keeping the eyes closed and bring the ends of the fingers together

(illustrates with arms outstretched) and touch the end of the nose, like I am able to do. In my opinion he is suffering from locomotor ataxia.

Q. What in your opinion, caused it?

Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 27.

A. In my opinion, by the process of exclusion, I believe the disease to be due to a trauma, I mean by that an injury. An injury produced, which I attended him for, on the 19th of November, 1912, following a railroad accident.

Q. Where was the injury?

Objection by defendant to this line of testimony. Objection overruled. Defendant excepts.

Exception No. 28.

A. Only complaint was made as to an injury to the left side of the head, just above the ear. That was the only visible injury, but how much shaking up of the balance of the system, I don't know how much there was.

His right knee was bursted open and lacerated. He was
126 in a dazed, semi-conscious condition when he arrived in Richmond. That must have been about 10 o'clock in the morning, he came in on the first train on the Coast Line the same morning of the injury. I have not gone over him thoroughly since last January. I have seen him since, but not minute examination. The disease has progressed. At that time I could not detect any loss of the *paid* sensation, and his whole general health is worse. I have not noticed any gastric crisis or bladder crisis. He has the lightning pains but none of the crises. It is slowly creeping on him.

Q. Since this last examination of him today, state what is your opinion as to his future condition as with respect to the locomotor ataxa inquired of?

Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 29.

A. The locomotor ataxia in his case I see no reason why it should not run the course as it does in everybody else—absolutely incurable and finally will kill him. In my opinion, in the condition I find him to be today, he is not able to perform the duties of a railway conductor. On January 6, 1913, he was just beginning to show the first signs of locomotor ataxia, and was in fairly good physical condition. I thought sufficiently for him to go to work. At the time my deposition was taken, which was read the other day, I had gone over him for examination, and his appearance—he had fallen off somewhat, but how much the disease had progressed I was unable to say. I have been his family physician ever since I have known him, practically 6 or 8 years. I have never discovered any symptoms

or evidence of syphilis in him. He has had the Wasserman test for syphilis. It was negative.

Q. What did that indicate?

127 Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 30.

A. That he did not have syphilis.

Q. State whether or not, in referring to the matter of alcohol and locomotor ataxia, state whether or not alcohol or alcoholism and, if so, to what extent, would produce locomotor ataxia?

Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 31.

A. I believe that chronic alcoholism can produce locomotor ataxia, but there would be other as prominent symptoms as the locomotor ataxia from the alcohol. They would be cirrhosis of the liver and breaking down of the heart from the cirrhosis of the liver. Captain Tilghman has none of those symptoms. By chronic alcoholism I mean a constant heavy drinker. I have never seen Captain Tilghman under the influence of liquor in my life. Never have seen him take a drink.

Q. Did you discover in your examination of him, or any treatment of him, any evidence of chronic alcoholism?

Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 32.

A. I have never discovered any symptoms of chronic alcoholism in Captain Tilghman.

Syphilis has been noted as the most frequent cause, alcoholism and trauma. By trauma I mean injury.

In my opinion, injury to the head will cause locomo ataxia and for this reason: If an injury to the lumbar spine, which is here, (indicating) can so far affect the brain as to produce an

128 Argyll-Robertson pupil, I do not see why an injury to the brain producing the Argyll-Robertson pupil, cannot affect the lumbar spine.

Objection by defendant specifically to this answer. Objection overruled. Defendant excepts.

Exception No. 33.

Cross-examination:

If you can tell me what produces the Argyll-Robertson pupil, you can tell me something nobody has ever been able to tell before. Locomotor ataxia is hardening of the spine and also a disease of the cerebella portion of the brain. It is a hardening of the spine. In my examination in Richmond, I said the blow on Captain Tilghman was on the right side of the head. That was a mere mistake. A mere slip of the tongue. I said in my examination there that

locomotor ataxia was due to hardening of the anterior columns of the spinal cord or the anterior columns of the cord. I am not responsible for the mistakes of the stenographer. I said posterior. I testified in Richmond that Captain Tilghman's locomotor ataxia was not any worse. I had not examined him. The deposition was taken last Monday. I was asked this question: "He is not any worse than when he left the hospital? and I replied, "He looks worse, but the locomotor ataxia is not any worse. The peculiar shuffling gait has not commenced." I was swearing so far as I could without a physical examination. Captain Tilghman was there but I wasn't asked to examine him. I did not say anything over there at all about any Wasserman test. It slipped my mind that there was any one made. That was the most important investigation as to whether he had had syphilis. It is the most important one and yet I did not mention it; it slipped my mind. I can give you the report
129 of the pathologist, Guy I. Hopkins, who made the test. I said syphilis was the principal cause and alcohol was the second. I was asked over there, what are put down as the principal causes, and my answer was, "Syphilis first and alcohol." That is correct. I was asked how locomotor ataxia was caused, and I answered it was caused by the poisons from syphilis and alcohol reaching the spinal cord and causing the spinal cord to become hardened. That is our theory of the cause. I sent all my cases of brain injury to Dr. Dunn. He is an eminent physician on eye, ear, nose and throat, and examines brain cases.

The first time I ever thought of locomotor ataxia in connection with Conductor Tilghman was when Dr. Dunn suggested it. I immediately suggested the Wassermann test. Prior to that time I had not thought of it. I first noticed it in January, and he was injured in November. I was examined in Richmond a little over a week ago, a week ago last Monday. I stated at that time, that Captain Tilghman was able to go back to work right then from his general appearance, without a physical examination. I was bound to go by his physical appearance as I did not make any examination. I said hundreds of men with locomotor ataxia are today, lawyers, doctors and other men going right on with their work. That is true. On the 5th of January, 1913, Captain Tilghman was able to go back to work. I stated that the cause of this man's trouble was punctate hemorrhages of the brain, that he had contusion of the brain with punctate hemorrhages, and this lead on to the formation of the locomotor ataxia. I said the punctate hemorrhages cause locomotor ataxia starting from this blow on his head. Captain Tilghman had evidences of that disease and these evidences continued, and Captain Tilghman showed these evidences about a month after he was injured; that was the first time I noticed it, and after he left the hospital I sent him to Dr. Dunn, and Dr. Dunn called my attention to those symptoms and I verified them. That was about a
130 month after he left the hospital. It is all guess work. I don't know how long these symptoms had been in existence. I can not say whether these symptoms were in existence before the time of this wreck; it is impossible for me to tell. They may have

been there six months or a year. They could have been there, but I did not discover it. If I had discovered them, I don't know to what I would have attributed the symptoms. I have not studied it. When it did come to my attention after the accident, I went to it by the method of exclusion. After excluding everything else, I was bound to say that was the cause. After excluding everything else, and if there had been no accident, I would have said there was no locomotor ataxia. I say now that not only I do not know absolutely positive what is the cause of any case of locomotor ataxia, neither does any other man. I can not say exactly in any case of locomotor ataxia what is the cause of the locomotor ataxia. Now nobody knows. It is under investigation. Nobody knows. A punctate hemorrhage is a min*tue* hemorrhage, about the size of a needle point, more of an excluding of the blood to the surface. In pin point size and very thick together. Some times they are small and large. I did not say in Richmond that punctate hemorrhages of the brain would produce poisons that would affect the spinal cord. If I said punctate hemorrhages of the brain caused it, it is a mistake of the stenographer, as it is absolutely unreasonable. That is an incorrect statement. No hemorrhage can produce an infection. The only way hemorrhage can affect the spinal cord is by pressure. If you increase the pressure in the head, it increases the pressure down below. I said that locomotor ataxia is caused by poison from alcohol and syphilis. That is the theory of the production. I say it is absolutely unknown. All of those are theories. Theoretically that is the modern thought but it is not proven. They have used salvarsan to try to cure it. I did not give as my opinion that syphilis is not the cause. I say that syphilis is one of the causes of loco-
131 motor ataxia. Hereditary syphilis may be without external manifestation, but you can always find external manifestations by close examination. I was Captain Tilghman's family physician for eight years. I treated him before for fractured arm once. He slipped on the ice. He did not hit any portion of the cerebella spinal tract at all. Simply a fractured arm. A fall on the arm affects the shoulder and that would jar the spinal column. I said trauma severe enough to produce hemorrhage can produce locomotor ataxia. If the trauma is light, it may cause an injury direct to the spinal cord and produce locomotor ataxia, if there is a direct injury to the spinal cord. You can have a direct injury to the spinal cord by a fall, but where it is possible to produce locomotor ataxia, it is more likely to produce paralysis. At the time we made the test for syphilis, Wassermann, of Germany, the man who originated the Wassermann test, found that—at the time it had not been proven positive. Since, they have proven that a negative Wassermann does not negative syphilis. At the time I had the Wassermann test made, it was thought that negative test would negative syphilis.

Redirect examination:

The bones in that broken arm healed perfectly. That indicated that there was no syphilis in his system.

Q. You used an expression in your testimony about excluding

certain causes. What do you mean by the exclusion of certain causes in arriving at the reason of this man's locomotor ataxia, or the cause of any man's disease?

A. If a patient comes to me with symptoms pointing to cerebella spinal treatment, I would first eliminate alcohol by the history in the case, by examination of his liver and spine and kidneys, and if I could find no evidence of alcohol there, I would eliminate syphilis as far as possible with the McGoochy test.

132 The defendant objected to the foregoing question and answer. Objection overruled. Defendant excepted.
Exception No. 34.

Q. They asked you something about a question in your deposition where they asked you if you had known that he was a heavy drinker, whether you would have considered that? State whether or not Captain Tilghman was a heavy drinker?

A. If I knew a man was a heavy drinker, and he gave me a history of a good deal of whiskey, and I could not find any evidence of cirrhosis of the liver and kidney produced by this alcohol, I would not exclude that as the cause of the locomotor ataxia; I would hunt other trouble, and if he did not have other trouble, I would go back to the alcoholism.

Defendant objects to this answer and asks that it be stricken out. Objection overruled and defendant excepts.
Exception No. 35.

At the time I testified in Richmond, I had not made any examination of Captain Tilghman since the preceding January, 1913. My testimony at that time was based upon my examination of 1913, and my observations of him as he sat in the chair. Before Captain Tilghman's injury in November, 1912, he manifested no symptoms of locomotor ataxia that I ever noticed.

Q. You stated that you have known him for years before his injury. State how his appearance and physical condition now compares with his appearance and physical condition before his injury in November, 1912?

Objection by defendant in the interest of time. Objection overruled. Defendant excepts.
Exception No. 36.

133 A. Before this injury Captain Tilghman was as fine a specimen of manhood as I ever saw, big, robust man, muscular, and now he is a wreck.

Objection by defendant specifically to this answer. Objection overruled. Defendant excepts.
Exception No. 37.

Recross-examination:

I did not find any symptoms of locomotor ataxia prior to the injury. I never noticed any locomotor ataxia in Captain Tilghman

before this accident, and never noticed any until the symptom of the Argyll-Robertson pupil was called to my attention in January nearly two months after the accident. I was his family physician.

Dr. H. W. GLASSCOCK, a witness for the plaintiff, having been duly sworn, testifies as follows:

Direct examination:

I live in Raleigh, N. C. I am an osteopath and a medical doctor. I have complied with all of the North Carolina laws in respect to the practice of medicine and osteopathy. I have a hospital. I am experienced in the treatment of nervous diseases. I can diagnose nervous diseases and try to give an opinion satisfactory to myself. (It is held by the court that the witness is an expert.) On the night of May 16th, Saturday night, I believe it was the 16th or 15th, I made a general physical examination of Captain Tilghman. I made a general physical examination by inspection, palpation, and percussion. I found the characteristic symptoms of locomotor ataxia, the Argyll-Robertson pupil, the Rhomburg
134 sign, I discovered the Argyll-Robertson pupil, by reflecting a small electric light to the eye. That is, the pupil responds to accom-odation but not light, and I found the Romburg sign or symptom, the patient standing with the feet close together, the swaying movement, which shows lack of coordination, and I found the loss of the patella reflex. Tapping of the patella tendon you get the reflex or the extension of the foot. I found no reflex there. I found the history of the lightning pains.

Q. What did Captain Tilghman tell you about his condition?

Objection by defendant.

Q. State any subjective symptoms.

Question by Mr. ALLEN: You mean by subjective what he told you?

A. Yes.

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 38.

A. I found the analgesia, loss of pain in the muscles and weakness. I discovered it by sticking the patient with a pin. The sense of the touch was apparently good, but after you stuck the patient with a pin and it goes through the skin into the muscles, there was very little sense of pain.

Objection by defendant to this whole line of testimony. Objection overruled. Defendant excepts.
Exception No. 39.

A. I stuck the pin half way to the head. He had other symptoms, the loss of strength in the extensory muscles, in the arm and legs.

A. The muscles that extend the arm, the muscles pull back like that (illustrating). His strength is not normal with the extensories.

The flexes were apparently good, all right, but the extensories were weak.

135 Q. After your examination, Doctor, what was your opinion in respect to him with respect to locomotor ataxia?

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 40.

A. My opinion as to locomotor ataxia, my opinion was since he had the cardinal symptoms or cardinal signs or manifestations of locomotor ataxia, that it was locomotor ataxia, after excluding other conditions or other symptoms, not finding any other symptoms or other diseases, particularly.

Q. State whether, in your opinion, locomotor ataxia can be caused by traumatic injury to the head, left side of the head?

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 41.

A. In my opinion it can be caused by trauma to the head.

Cross-examination:

I have been practicing medicine as distinguished from osteopathy since June, I believe it was June, Friday 13th, 1913. Just what locomotor ataxia exactly is I do not think anyone exactly knows, but we know the characteristics quite well.

Redirect examination:

Q. State to the jury, Doctor, whether or not there was anything developed in your examination of Captain Tilghman which lead you to the opinion that he was suffering from traumatic injury?

Objection by defendant.

Q. I mean by that, whether there were any prior symp-
136 toms which would indicate an entire shake-up to the nervous system?

Objection by defendant. Objection overruled. Defendand excepts. Exception No. 42.

A. The man's general look and his characteristics in general the appearance of the man, his loss of flesh. I had never seen Captain Tilghman before until the other night, but feeling of his flesh and skin, the man has apparently lost a great deal of flesh, and his expression, his gait, his general make-up is quite characteristic of a man that has been in some shake-up of some kind.

Objection by defendant specifically to this answer. Objection overruled. Defendant excepts.
Exception No. 43.

Recross-examination:

I examined Mr. Tilghman at the hospital at his request.

Q. Did you examine him for the purpose of testifying in this case?

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 44.

J. T. BRYANT, a witness for the plaintiff, having been duly sworn, testifies as follows:

Direct examination:

I live in Richmond, Va. I was baggagemaster on Captain Tilghman's train a part of the time. I was on his train at Hamlet
137 the morning it was said he was under the influence of liquor. He was not under the influence of liquor. I was the baggagemaster on the morning of the 19th of November, when these trains were wrecked. I think we left Norlina somewhere near 3:40. Captain Tilghman came in the baggage car, as he usually does, and read his orders over to me. He read, No. 84 will meet No. 81 at Grandy, and as a rule I always repeated the meeting point back to him, so as to understand, I said meet 81 at Grandy, and then he made a remark, laid the order down, and made a remark that he did not like the idea of having two stations on the same district with names so near alike, it was liable to cause a misunderstanding. Then he held his order up to the light in the top of the car, in this manner (illustrating) and read it over the second time, No. 81 at Grandy. Then he came around some baggage from the door to where I was standing in the side of the car, where there was a mail rack and pigeon hole boxes where I was assorting my local mail, had my hands full of mail, with the order in his hand and says to me, this looks like Grandy to me, what does it look like to you? I looked at the bottom of the order and said, it looks like Grandy to me. (Counsel holds up framed copy of the order.) This order in this condition is more deeply outlined, heap more plainer. The copy I saw was very dull. The one I saw looked like Grandy.

Q. What does that look like to you?

Objection by plaintiff. Objection overruled. Defendant excepts.

Exception No. 45.

A. It can be taken for either one.

This office copy looks nearer like the one I saw, but neither one is the copy I saw. The copy I saw was destroyed. The one I saw looked like Grandy.

Q. Was there any question in your mind about it looking like Grandy?

138 Objection by defendant. Objection overruled. Defendant excepts.

Exception No. 46.

A. None at all.

Before we reached Granite I heard the engineer give station blow. Little while after that he gave two short blasts of the whistle, which is the answer to a signal.

Q. State whether or not those two short blasts indicated a go-ahead signal?

Objection by defendant. Objection overruled. Defendant excepts. Exception No. 47.

A. Yes.

I saw lights on this train on the siding at Granite—and white station light. That would indicate proceed and also indicate a clear track.

Cross-examination:

That signal, the two short blasts, did not mean for the conductor to go by a point that was fixed as a meeting point with another train. If he had a meet order to stop for Granite, and approached Granite somebody gave a go-ahead signal he would have stopped, whether he got the signal or not. The go-ahead signal did not mean go ahead in spite of any orders, neither did the white light. Neither of them had anything to do with the meet order. Two short blasts of the whistle is the response to any signal. If the engineer gave the station signal, and the conductor pulled the signal cord once, the engineer would acknowledge that with two short blasts. When I said it was an answer to go-ahead signal, it might have been a signal that the switch was all right, and not meant to go ahead.

139 W. B. TILGHMAN, the plaintiff in this action, having been recalled, testifies as follows:

Redirect examination:

I was not intoxicated at Hamlet as testified by witnesses—or at any other time. I was not intoxicated at the door of a hotel in Columbia. I have never seen the two men before who said I carried them past their station. I have taken a drink in the hotel in Columbia. I did not take as many as six drinks in Matthews' presence at any time in Columbia. I did not state to Mr. Gore that I was not going to take another drink. I was suspended on account of the report that I was drinking. After the examination they restored me. I was not intoxicated as testified by the witness Marrow. I did not state to Matthews on the way from the wreck to Richmond while on the train, that I had my order then in my pocket. No, I did not. The last time and place that I saw that order I had to meet at Grandy I folded it and left the baggage car after showing it to Bryant. I left it on the front seat of the colored car. That was the usual place I had to leave such orders. That was the place I kept my tickets and papers I was using on the train. I did not make any statement to Paschall about the occurrence of this wreck or anything about my orders. I did not make any statement to Coleman about my order while I was at Granite.

Q. Did you ever read that order that they gave to you, that meet order that night, anything except Grandy?

Objection by defendant. Objection overruled. Defendant excepts.
Exception No. 48.

A. No.
I did not pull the bell cord or stop cord before I reached Granite, or as I passed Granite, or anywhere along there. (Counsel hands witness the framed copy of order.) This is something similar to the order that I had. It is not as plain as the one I had, except the meeting point. This point here, I do not see how you can make out of it anything. The order I had read Grandy. That final word on that exhibit does not look like the final word on the order I had to run by. That does not look like my signature at all. I could not swear to that. The "h" is crossed with the "t" and all that sort of a thing. This other exhibit in evidence, pasted on a cardboard, and referred to in the examination as the office copy, does not look like the final word on the order they gave me to run by. I could not tell if it is my signature, it is all rubbed out so you can not tell. The final word on the order they gave me to run by was clear. I read it as the rules required me to. Beckham was the first man to read the order when I reached the train that time. He read it No. 84, engine 91, will meet No. 81, engine 93, at Grandy. The final word on the order they gave to run by was clear. I had no doubt that it was Grandy. I read it as the rules required me to. Mr. Beckham, the engineer, was the first man who read the order when I reached the train that time. He read it: "No. 84, engine 91, will meet No. 81, engine 93, at Grandy." There was no hesitancy about his reading it that way. There was no doubt that he said Grandy. I did not see him read it to anybody else. He had a fireman. It was not his duty to read it in my presence to the fireman. Mr. Bryant occupied the position of baggagemaster and rear flagman on that train. I held up the order and Bryant read it in my hand. When he came to the word "Grandy," I made him spell it out "G-r-a-n-d-y."

Recross-examination:

I gave Engineman Backham a copy of the only order I got at Norlina to meet train 84. The copy of the meet order that Engineman Beckham had would have been the only meet order that I got at Norlina. I live in Greenville, Pitt County.

141 Q. Where did you live at the time of this accident?

Objection by plaintiff. Objection sustained. Defendant excepts. Exception No. 49.

I have never lived in Wake County. I had known for some time prior to this accident that those two stations were named Granite and Grandy. Ever since I had been on the road. You see the station was changed from Scott to Granite. It had been Granite for some years. I knew that the block system was in use over there. I knew that they dispatched trains there by telephone. I had known for

several years that the block system was not in use and the telephone system was in use.

Redirect examination:

I could not tell whether I gave Mr. Beckham, the engineer, a copy of the order I received or the original. They were both just alike. I could not tell which I gave him. I could read the copy that I got all right.

It is admitted that the rule book for the operation of defendant's trains in effect at the time of this collision, a copy of which was in plaintiff's possession, contained the following rules, which plaintiff offers in evidence:

210. When a "31" train order has been transmitted, operators must (unless otherwise directed) repeat it at once from the manifold copy in the succession which the several offices has been addressed, and then write the time of repetition on the order. Each operator receiving the order should observe whether the others repeat correctly.

210 (*c*) Conductors must personally deliver all orders to engineers (except when 19 orders are delivered by the operator) and enginemen must read them aloud to conductors.

211 (*a*) Conductors must read orders to rear brakemen and baggageman and engineman must read orders to fireman.

142 It is admitted that the rule book contained the following rules which are offered in evidence by the defendant:

106. In all cases of doubt or uncertainty, take the safe course and run no risks.

554. Conductors are responsible for the safe handling, prompt movement and proper care of their trains; for the conduct of the men employed thereon, and for the signals, lamps, supplies and tools entrusted to their care.

Defendant offers in evidence letter attached to the deposition of Dr. Hillsman, marked Exhibit "F."

Plaintiff rests.

Defendant rests.

At the conclusion of all the evidence, plaintiff tenders the following issues:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint and the amendment thereto?

2. Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

3. What damages is the plaintiff entitled to recover of the defendant?

Defendant objects to the issues as tendered by plaintiff. Objection overruled. Defendant excepts.

Exception No. 50.

The defendant tendered the following issues:

1. Was plaintiff injured by the negligent failure to have the block system, as alleged in the complaint?

2. If so, did plaintiff voluntarily assume the risk of being injured thereby?

3. Was plaintiff injured by using the telephone system to transmit orders, as alleged in the complaint?

4. Did plaintiff voluntarily assume the risk of being injured thereby?

5. Was plaintiff injured by negligence of the defendant in
143 maintaining two stations named Grandy and Granite, as alleged in the complaint?

6. If so, did the plaintiff voluntarily assume the risk of being injured thereby, as alleged in the answer?

7. Was the plaintiff injured by the negligence of the defendant in giving an order to train No. 81 to meet train No. 84 at Granite, and giving an order to train No. 84 to meet train No. 81 at Grandy?

8. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?

9. What is the whole amount of damages, if any, sustained by the plaintiff by reason of the negligence of the defendant?

10. What amount, if any, shall be deducted from the damages sustained by the plaintiff as the portion thereof attributable to the plaintiff's own negligence?

The Court refused to submit these issues or any of them and defendant excepts.

Exception No. 51.

Motion by plaintiff for leave to amend his complaint. The Court allows the amendment in so far as it conforms to the evidence, not otherwise.

The plaintiff withdraws from his complaint paragraphs A, B and C; and, under paragraph A, matter pertaining to the block system, phone system, and similarity of the names of the stations, and requests that the evidence bearing upon the same be withdrawn from the jury, which motion is allowed.

Objection by defendant to amendment and withdrawal.

Exception No. 51½.

By the COURT:

If I find that their complaint is not sufficient to meet the evidence, I will allow the amendment to conform to the scope of the evidence taken.

144 The following withdrawal was filed by the plaintiff:

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

The plaintiff in the above-entitled action hereby before the submission of the case to the jury withdraws from his complaint here-

tofore filed herein the provisions therein designated as sub-paragraphs A, B, and C, in paragraph eight.

Respectfully submitted,

R. N. SIMMS,
DOUGLASS & DOUGLASS,
Attorneys for Plaintiff.

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

In the above entitled action the plaintiff before the commencement of the argument to the jury respectfully requests the court to withdraw from the consideration of the jury *and* all evidence in the case relating only to the allegations of negligence on the part of the defendant with respect to the three following particulars as mentioned in said paragraphs A, B, and C of paragraph eight of the plaintiff's complaint, to-wit:

(*a*) The having and maintenance by the defendant of two stations on its line of railway in close proximity and with names so similar in sound and so closely resembling each other in chirography that one might be very easily mistaken for the other.

(*b*) The failure of the defendant to have in operation upon its said line of railway from Norlina, N. C., to Richmond, Va., a system of signals known as the block system to control the operation and movement of its trains.

145 (*c*) The operation by the defendant of its trains No-. 84 and 81 upon telephonic communication.

Respectfully submitted,

R. N. SIMMS,
DOUGLASS & DOUGLASS,
Attorneys for Plaintiff.

Amendment to Complaint.

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

The plaintiff in the above-entitled action by leave of the Court amends his complaint heretofore filed herein by adding thereto a paragraph to immediately precede paragraph No. 9 and to be designated as paragraph 8 (F), and reading as follows, to-wit:

In that the defendant negligently delivered to the plaintiff at Norlina, N. C., at the said time the train order aforesaid for the meet-

ing of his said train No. 84 with train No. 81 written in such form and manner that if the same was intended to refer to any other meeting place than "Grandy," nevertheless, the same was so negligently written that the word appeared to be "Grandy;" and in that when the plaintiff read his said train order to the defendant before leaving Norlina, as he did so read it aloud in a plainly audible and distinct tone of voice, "Grandy," the defendant negligently assented to and approved the said reading and pronunciation of the said "Grandy;" and in that thereafter and before the plaintiff's said train reached the station Granite, N. C., the defendant negligently twice read the said order to the plaintiff and each time read and pronounced the same in respect to the meeting place therein designated, "Grandy."

(Signed) DOUGLASS & DOUGLASS,
R. N. SIMMS,
Attorneys for Plaintiff.

146 NORTH CAROLINA,
Wake County:

W. B. Tilghman, being duly sworn, deposes and says that the foregoing amendment to his complaint heretofore filed herein is true to his own knowledge, except as to matters stated upon information and belief, and that as to those matters he believes it to be true; and further that his complaint heretofore filed herein as thus amended is true to his own knowledge, except as to matters stated upon information and belief, and that as to these matters he believes it to be true.

(Signed) W. B. TILGHMAN.

Subscribed and sworn to before me this 22nd day of May, 1914.

(Signed) VITRUVIUS ROYSTER,
Deputy C. S. C., Notary Public.

Defendant objects to the allowance of this motion and files the following written objection thereto:

NORTH CAROLINA,
Wake County:

In the Superior Court, May Term.

(Title of Cause.)

The defendant files this objection and exception to the amendment to the complaint offered by plaintiff at the conclusion of all the evidence in this case and on the morning after the said case had been closed the day before: For that the said amendment comes too late and takes the defendant by surprise in that the defendant's defense to the allegations of the complaint was prepared to meet the allegation that the plaintiff was given an order for train 84 to meet train 81 at Grandy, and the defendant did not produce witnesses who were available and could have been secured for the purpose of show-

ing that the order which was found on the body of Engineman Beckham, and which was offered in evidence was written in the usual and customary way and could not be mistaken for an order
147 to meet at Grandy, and in that defendant could and would have been prepared to show by expert railroad men and others that the said order made Granite the meeting point of train 84 and train 81 and that Grandy was not made the meeting point and that the name of the meeting place in said order could not be mistaken for Grandy, and in that the defendant had no opportunity after said amendment was offered to produce and offer its evidence to the jury to meet such allegation, and in that the defendant had no opportunity to examine or cross examine the plaintiff to show that the meeting point fixed by the order offered in evidence by the defendant was Granite and not Grandy, and that if an exact copy of that order had been presented to him at Norlina by the operator he would not have mistaken the meeting point fixed therein, and in that the defendant was prevented in other ways from preparing to meet said amendment.

Without waiving, and relying upon any and all the objections to the permission of said amendment, the defendant files this written objection.

MANNING & KITCHIN,
MURRAY ALLEN,
Defendant's Attorneys.

Filed.
O. H. ALLEN, *Judge.*

The motion is allowed over defendant's objection and defendant excepts.

Exception No. 52.

This amendment having been allowed, it is by consent of plaintiff's counsel regarded as denied by defendant and verification of such denial is waived.

The plaintiff moves the Court for permission to withdraw from his complaint paragraphs 8 (*a*), 8 (*b*) and 8 (*c*), and in paragraph 8 all matter pertaining to the block system, phone system,
148 and similarity of the names of stations, and requests that the evidence bearing upon the same be withdrawn from the jury.

Defendant objects to this motion. Motion is allowed. Defendant excepts.

Exception No. 53.

Defendant's Requests for Special Instructions.

The defendant in apt time and in writing, requested the Court to charge the jury as follows:

1. There is no evidence of negligence on the part of the defendant in failing to have the block system in operation between Norlina and Richmond, and you will answer the first issue "No."

The Court refused to give this instruction and defendant excepts.

Exception No. 54.

2. There is no evidence that the defendant was negligent in using the telephone system of communicating train orders on its line between Norlina and Richmond, and you will answer the third issue "No."

The Court refused to give this instruction and defendant excepts. Exception No. 55.

3. There is no evidence that the defendant negligently and carelessly had had and maintained two stations upon its single line of railway in close proximity with names so closely resembling each other in chirography that one might very easily be mistaken for the other, and you will answer the fifth issue "No."

The Court refused to give this instruction and defendant excepts. Exception No. 56.

149 4. There is no evidence that plaintiff was injured by defendant's having and maintaining two stations named Grandy and Granite, and you will answer the fifth issue "No."

The Court refused to give this instruction and defendant excepts. Exception No. 57.

5. The burden of proof is upon the plaintiff on the seventh issue to satisfy you by the preponderance of the evidence that the defendant negligently and carelessly gave an order to the plaintiff, W. B. Tilghman, for train No. 84 to meet train No. 81 at Grandy, and unless you are so satisfied you will answer the seventh issue "No."

The Court refused to give this instruction and defendant excepts. Exception No. 58.

6. If you find from the evidence that the plaintiff, Tilghman, received an order similar to the one delivered to Engineer Beckham and that the order read for trains No. 84 and No. 81 to meet at Granite, then the plaintiff was guilty of contributory negligence, and you will answer the eighth issue "Yes."

The Court refused to give this instruction and defendant excepts. Exception No. 59.

7. If you find that plaintiff was injured by the defendant's negligence, and if you find the facts to be true as testified to by the plaintiff Tilghman, he was guilty of contributory negligence, and you will answer the eighth issue "Yes."

150 The Court refused to give this instruction and defendant excepts.

Exception No. 60.

8. Upon the plaintiff's own evidence the court instructs you that if you find that he received an order for train No. 84 to meet train No. 81 at Grandy and that the order was — such a doubtful character that it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was and if he had done so the collision would have been prevented, then his failure to stop at Granite was negligence on his part and if you find that it was the sole proximate cause of the injury you will answer the issue of negligence "No."

The Court refused to give this instruction and defendant excepts. Exception No. 61.

9. Before you can answer the issue of negligence in ordering train No. 84 to meet train No. 81 at Grandy the plaintiff must satisfy you

by the preponderance of the evidence that the order delivered by the operator at Norlina to the plaintiff Tilghman read as the meeting place "Grandy," and if the plaintiff has failed to show by a preponderance of the evidence that this order was to meet at "Grandy," you will answer the issue of negligence in favor of the defendant—"No."

The Court modified this instruction by adding after the word "Grandy," in line 5 the following, "Or was so negligently written that it appeared to be Grandy upon careful reading of it."

To the refusal to give the instruction as requested, and to this modification, the defendant excepts.

Exception No. 62.

151 10. The plaintiff alleges in his complaint that his train ... 84 was ordered to meet train No. 81 at Grandy and that this caused the collision. The burden to show that train No. 84 was ordered to meet No. 81 at Grandy is upon the plaintiff, and if the plaintiff has failed to satisfy you by a preponderance of the evidence that he had an order to meet train No. 81 at Grandy, you will answer the issue of negligence "No."

The Court refused to give this instruction and defendant excepts.

Exception No. 63.

11. In this action the plaintiff having alleged that he had an order for his train No. 84 to meet train No. 81 at Grandy, the burden is on the plaintiff to show this by the greater weight of the evidence and he cannot show it by satisfying you that he misread an order; but he must satisfy you by the preponderance of the evidence that the defendant negligently ordered his train to meet the train No. 81 at Grandy, and if he has failed to so satisfy you, you will answer the issue of negligence "No."

The Court modified this instruction by adding after the word "order" in line 5, the following: "Unless he further shows that a careful reading would mislead;" and by adding after the word "No," at the end of the said special request the following: "As to that phase of the case."

To the refusal to give this instruction as requested and to modifications thereto the defendant excepts.

Exception No. 64.

12. If you find from the evidence that the plaintiff had a doubt as to whether the order received by him read "Grandy," it was his duty to stop at the first station unless he had found this doubt before leaving Norlina, in which case it was his duty to remain at Norlina until all doubt could be removed. If you find that
152 the plaintiff had such doubt and did not pursue the safe course, you should answer the issue of contributory negligence "Yes," and in considering whether the plaintiff had such doubt you should consider his testimony and the testimony of his baggage master which the defendant contends show such doubt.

The Court refused to give this instruction and defendant excepts.

Exception No. 65.

13. The Court instructs you that the mere proof of a collision in this case is not in itself sufficient to establish negligence on the part of the defendant, and unless you further find by the pre-

ponderance of the evidence that this collision was caused by the negligence of the defendant in giving the plaintiff an order for train No. 84 to meet train No. 81 at Grandy, you will answer the issue of negligence "No."

The Court refused to give this instruction and defendant excepts. Exception No. 66.

14. If you find from the evidence that the order offered in evidence by the defendant is a copy of the order which was delivered to Conductor Tilghman, you will answer the seventh issue "No."

The Court refused to give this instruction and defendant excepts. Exception No. 67.

15. If you find from the evidence that the order offered in evidence by the defendant is a copy of the order which was delivered to Conductor Tilghman and that the order offered in evidence does not read "Grandy," you will answer the seventh issue "No," and in order to do this it is not necessary for you to find that the order in evidence reads "Granite," as the burden would be upon
153 the plaintiff to show you by the preponderance of the evidence that this order reads "Grandy."

The Court refused to give this instruction and defendant excepts. Exception No. 68.

16. Upon all the evidence, the Court instructs you to answer the second issue "Yes."

The Court refused to give this instruction and defendant excepts. Exception No. 69.

17. Upon all the evidence, the Court instructs you to answer the fourth issue "Yes."

The Court refused to give this instruction and defendant excepts. Exception No. 70.

18. Upon all the evidence, the Court instructs you to answer the sixth issue "Yes."

The Court refused to give this instruction and defendant excepts. Exception No. 71.

19. The Court instructs you that in answering the issue of negligence you cannot consider the evidence that the name of the station of Granite has been changed to Paschall since this collision, because the change in the name of the station by the defendant is not evidence of negligence.

The Court refused to give this instruction and defendant excepts. Exception No. 72.

154 20. Under the Federal Employer's Liability Act, proof of the collision in this case is not sufficient in itself to establish negligence, and the burden of proof is still upon the plaintiff to satisfy you by a preponderance of the evidence that the collision was caused by the negligence of the defendant.

The Court refused to give this instruction and defendant excepts. Exception No. 73.

21. If you believe the evidence of the plaintiff and of his witness J. T. Bryan, you will answer the issue of contributory negligence "Yes."

The Court refused to give this instruction and defendant excepts. Exception No. 74.

22. Upon all the evidence, the Court instructs you to answer the issue of contributory negligence "Yes."

The Court refused to give this instruction and defendant excepts.

Exception No. 75.

23. If you find from the evidence that plaintiff was given an order by the defendant's operator for train No. 84 to meet train No. 81 at Granite, you will answer the issue of negligence "No."

The Court refused to give this instruction and defendant excepts.

Exception No. 76.

24. If you find from the evidence that this collision was caused by the failure of the plaintiff to observe the rules of the defendant company, you will answer the issues of negligence "No."

155 The Court refused to give this instruction and defendant excepts.

Exception No. 77.

25. If you find from the evidence that the plaintiff was in doubt as to the meeting point of train No. 84 with train No. 81, and you should further find that defendant's rules required him in case of doubt to pursue the safe course, and you should find that the safe course would have been to have stopped his train at Granite, and that by stopping his train at Granite, the collision would have been prevented and the plaintiff would not have been injured, you will answer the issue of negligence "No."

The Court refused to give this instruction and defendant excepts.

Exception No. 78.

26. If you find from the evidence that the rules of the defendant required the plaintiff in case of doubt or uncertainty to take the safe course and that the safe course, would have been to have stopped train No. 84 at Granite, and that by stopping train No. 84 at Granite, the collision would have been prevented, you will answer the issue of negligence "No."

The Court refused to give this instruction and defendant excepts.

Exception No. 79.

27. It was the duty of the plaintiff under the rules of the defendant, in case of doubt or uncertainty as to the meeting point of train No. 84 with train No. 81, to have stopped his train at Granite and if you find that he was in doubt or uncertainty as to such meeting point and his failure to stop at Granite was the proximate cause of his injury, you will answer the issue of negligence "No."

156 The Court refused to give this instruction and defendant excepts.

Exception No. 80.

28. If you find that the injuries to plaintiff resulted from one of the risks ordinarily incident to the work in which he was engaged, you will answer the issue of assumption of risk "Yes."

The Court refused to give this instruction and defendant excepts.

Exception No. 81.

Judge's Charge.

At 11:15 a. m., Saturday, May 23rd, 1914, the Court instructed the jury as follows:

Gentlemen of the jury:—This is an action brought by the plaintiff Tilghman to recover damages for injuries which he alleges were caused by the negligence of the defendant railroad.

The defendant denies the charges of negligence, and says that it was in no wise guilty of negligence, and that the real cause of the plaintiff's injury was his own negligence, and it, therefore, denies that it is liable for the injuries received by him.

There are three issues submitted to you. The first one is as to the negligence of the defendant. Was the plaintiff injured by the negligence of the defendant as alleged? The second is as to whether the plaintiff himself was guilty of contributory negligence, as alleged, and the third is as to damages. I have not the issues before me, but that is the substance of them. Yes, here, the second issue reads, Did the plaintiff contribute to his own injury by his negligence as alleged in the answer.

I will take the issues up separately. This first one, Was the plaintiff injured by the negligence of the defendant, as al-
157 leged in the complaint, and the amendment thereto, has reference to the question as to whether the injury was caused by the negligence of the defendant in ordering the trains to meet at Grandy. That is the first allegation of negligence, that the order directed these two trains, 84 and 81, directed the train in which the plaintiff was in charge as conductor, which I believe was 84, to meet at Grandy. (Then, there is a second allegation embraced in the amended complaint, which is similar to the first, but it is to the effect that the order was so negligently written that the word appeared to be Grandy even though it might have been intended to be Granite, and that on that account, if not on the first, and on the one or the other, the negligence in either putting it Grandy, or negligently writing it so it appeared to be Grandy, the trains collided, and the plaintiff was injured.)

To the foregoing charge in parentheses, defendant excepts. Exception No. 82.

That is the contention of the plaintiff, while the defendant denies it, and says that the order was plainly written, and that it was plainly written Granite, and that the whole affair resulted because of the negligence of the plaintiff in not reading it, not properly examining it, and that if he had done so he would have discovered that it was Granite and not Grandy.

(If the jury find from the evidence that the defendant negligently delivered to the plaintiff an order that his train No. 84 should meet train No. 81 at a station Grandy, and negligently gave to the conductor of train No. 81 an order to meet train No. 84 at Granite, and that this negligence on the part of the defendant was the proximate cause of the plaintiff's injury, and is established by the greater weight of the evidence, you will answer the first issue "Yes.")

To the foregoing charge in parentheses, defendant excepts.
Exception No. 83.

158 (In considering that first phase of it, that is, that it was written Grandy, or the same principle would apply if it was so negligently written that upon a proper examination of it, and I should say that that means a careful examination of it by the conductor, under those circumstances, and it then still appearing to be Grandy, then this same instruction would apply, if the facts are established by the greater weight of the evidence, and if they are not so established by the greater weight of the evidence, then your answer to the first issue should be "No.")

To the foregoing charge in parentheses, defendant excepts.
Exception No. 84.

(That is to say, you take the evidence and weigh it in your minds, not according to the greater number of the witnesses but according to the greater weight of the evidence, its weight and force, and if the evidence shows by the greater weight that that order read Grandy, or that that order was so negligently written, so defectively written that one in the capacity of a conductor and receiving orders of that importance, after carefully examining it, construed it reasonably to be Grandy and not Granite, and I say that if that is established by the greater weight of the evidence, you will answer it "Yes," and if it is not established by the greater weight of the evidence, you will answer it "No.")

To the foregoing charge in parentheses, defendant excepts.
Exception No. 85.

(In considering the evidence, if the jury find from the evidence the plaintiff received his order to meet the train and read same to the defendant and pronounced the last word of said order Grandy, and if the defendant so heard it and assented thereto, and if the jury further find from the evidence that the defendant had

159 delivered an order to train 81 to meet the plaintiff's train 84 at Granite, then these matters would be evidence for your consideration in saying whether the injury was caused by the negligence of the defendant.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 86.

(And so if the jury find from the evidence that the plaintiff read the train order received by him and relating to the meeting of trains Nos. 84 and 81 to the defendant's operator at Norlina, and pronounced the name of the meeting place as Grandy, and if the jury shall further find from the evidence that the meeting place intended by the defendant to be designated by said order was in fact Granite, and shall further find from the evidence that the said operator of the defendant at Norlina failed to correct the plaintiff's said reading and understanding of said order, then these are matters of evidence which the jury will consider upon passing upon this issue as to the negligence.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 87.

And you will remember that there is an issue between the parties

as to whether the conductor pronounced the name Grandy or Granite, he claiming that he did so, but the operator claiming it was read Granite.

(And the same as to the reading of the order by the engineer. If he read it Grandy, and you find he did, it is evidence to be considered in saying whether the injury was caused by negligence or not, and it is also evidence in saying, in passing upon the question as to whether the plaintiff negligently read the order, bearing upon negligence in that respect as I have just indicated, but before you can answer the issue of negligence with reference to ordering the train 84 to meet train 81 at Grandy, the plaintiff must satisfy you by the preponderance, that is, the greater weight of the evidence,
160 that the order delivered by the operator at Norlina to the plaintiff Tilghman read as the meeting place Grandy, or at least was so negligently written that it appeared to be Grandy upon a careful reading of the same.)

To the foregoing charge in parentheses, defendant excepts. Exception No. 88.

The plaintiff alleges in his complaint that his train 84 was ordered to meet train 81 at Grandy, and that this caused the collision, so the burden to show that is upon the plaintiff, and if the plaintiff fails to satisfy you by the greater weight of the evidence that he had an order to meet train 81 at Grandy, you would answer the issue "No," as I have indicated to you.

The mere proof of a collision is not in itself sufficient to establish negligence upon the part of the defendant, and unless you find by the preponderance of the evidence that this collision was caused by the negligence of the defendant, you will answer this issue "No."

Just here on the question about this order, if you find that he had such an order. Something was said about the white lights being exhibited at Granite. It would be his duty if he had such an order and was in doubt about it, to disregard the white lights, I should say, to stop and make proper examinations, proper inquiry.

Now if you answer the first issue "No," you go no further, but return your verdict. If you answer the first issue "Yes," that is that he was injured by the negligence of the defendant, then you go to the second issue.

The second issue has reference to contributory negligence, that is, did the plaintiff contribute to his injury by his negligence, as alleged in the answer. Contributory negligence is the failure to discharge a duty on the part of the plaintiff which concurs or co-operates with the negligence of the defendant, and is the proximate cause of the injury; that is to say, did he fail to discharge a duty, or did
161 his failure to discharge a duty concur with the failure of the defendant to discharge a duty, and thereby become a proximate cause of the injury. The burden upon that issue is upon the defendant to satisfy you by the greater weight of the evidence that he contributed to his injury by his own negligence, and the negligence relied upon is that he carelessly read the order and that the order, if it was like it is contended for by the plaintiff, was of such a nature and in such a condition as to, and was, calculated to produce doubt in his mind, and did produce doubt in his mind, and under

the rules of the railroad, under these circumstances, it was his duty to stop and make inquiry, and examine into the matter, before going further, and that he failed to do that, that he failed to make such inquiry or such examination as was his duty to do, and that by reason of his failure to do that the collision was brought about. In other words, the defendant contends that his own conduct was that he had some doubts about it, and that if his own conduct did not show it, that the paper which they say can be read Grandy as well as Granite, that if it was of that character, that if it could not be distinctly read Grandy, that he must have had some doubt about it, then and with that doubt, under the rules of the railroad he was required to stop either at Norlina before going any further, or at least upon reaching Granite he should have stopped there and made some inquiry or examination into the question whether it was really intended for Grandy or Granite, and if he had done that the accident or injury would have been prevented.

(Now, upon the plaintiff's evidence, if you find that he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was of such a nature, of such a doubtful character that it was uncertain as to whether it was Grandy or Granite, then it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was, and if you find that to be the fact, and that if he had done so the collision would have been pre-
162 vented, and that his failure to stop at Granite under the circumstances was negligence on his part, and that it was the proximate cause of the injury, you would answer the second issue "Yes," if shown by the greater weight of the evidence. If you find from the evidence that the plaintiff had a doubt as to whether the order received by him read Grandy, or if there was reasonable grounds *from* him to doubt it, it was his duty to stop at the first station, unless he had found this doubt out or had reasonable grounds to find it out before leaving Norlina, in which case it was his duty to remain at Norlina until all reasonable doubt was removed. And so if you find that he had such doubt, or reasonable grounds for it, and did not pursue the safe course, and that by reason of his failure to do so the collision occurred, that that was the proximate cause of it, then you will answer the issue as to contributory negligence, "Yes." And you would consider all the evidence throwing any light upon that question, both the defendant's evidence, the plaintiff's evidence, and the evidence of the baggagemaster and all the other witnesses, that throw any light upon that question.)

To the foregoing charge in parentheses, defendant excepts. Exception No. 89.

And if the jury shall find from the evidence that the defendant negligently gave the plaintiff an order relative to the meeting place of trains Nos. 84 and 81, by which it intended to designate the meeting place as Granite, and that the same was carelessly written, so carelessly written that the name of the meeting place when inspected with care, with the care of an ordinary prudent person under the plaintiff's circumstances, clearly appeared to be Grandy, and if the jury shall further find from the evidence that the plaintiff in read-

ing and acting upon such order exercised the care of an ordinary prudent person under the circumstances, and read the same Grandy,

163 after exercising the prudence of a person under those circumstances, which I should say required careful examination, and that then he had no doubt that the said word was Grandy, and that the plaintiff in the exercise of the care of a prudent person, acting in the capacity of this plaintiff under the circumstances, had no opportunity thereafter and prior to the collision which caused the injury to ascertain such mistake, and that he did not so ascertain the same, then they would answer the issue "No" as to contributory negligence, the burden, as I have already stated, being upon the defendant to show by the greater weight of the evidence that the plaintiff was guilty of contributory negligence, that is, the burden being upon him to establish this second issue.

Now, if you answer the second issue "No" and have answered the first issue "Yes," you go to the third issue, or if you answer the second issue "Yes" and have answered the first issue "Yes," you will proceed to the third issue, that is to say, if you answer the first issue "Yes," you go to the second and third isues. If you answer it "No," you will return your verdict, but if you answer it "Yes," you proceed to answer the second and third issues.

(Upon the third issue, What damage is the plaintiff entitled to recover, the rule is this: He would be entitled to recover, if entitled at all, for past and prospective loss resulting from the wrongful act of the defendant, including indemnity for actual expense, if there is any evidence of actual expense, incurred for medical attention, loss of time from inability to perform mental or physical labor, if there is any evidence bearing upon the inability to perform mental or physical labor, and incapacity to earn money and for actual suffering of body and mind when they are the immediate and necessary consequences of the negligent injury.)

To the foregoing charge in parentheses, defendant excepts

Exception No. 90.

And just here, as the counsel in concluding have read the insurance tables or mortuary tables, you are not bound by those

164 tables. It gives the probable life of one, but, of course, it cannot give it as an absolute certainty, and then you are not bound to conclude that he would continue all the while to get the same wages that he is getting now. He might get higher wages or he might get lower wages, or he might get higher wages up to a certain turn of his life and then less afterwards. You are to consider all of those matters, and then get the present worth of it all.

(Then, in passing upon this issue as to damages, one of the very important matters connected with it is this question of the disease which it is contended he has now, locomotor ataxia, and you are to consider as to whether it has been established by the greater weight of the evidence that it resulted from this injury. Quite a controversy there, the plaintiff contending that it is the result of the injury, and the defendant contending that it is the result of some other cause, either the use of intoxicants or some lurking disease which was already there ,and the plaintiff contending that even if it was

already there, it was precipitated by the injury, but you are to consider as to whether it has been established by the greater weight of the evidence that it resulted from this injury, and, if so, then you take it into consideration in fixing the amount of damages, if you reach the issue on damages.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 91.

(And now another question comes in here, which is interesting because it is of recent application in our law. I have sometimes said, if the gentlemen will pardon me for saying so, that the jury have for many years been unconsciously applying it, but under this act under which this action is brought you are permitted to apply it if you find that he was guilty of contributory negligence. Ordinarily, where the jury have found that the defendant was guilty of contributory negligence, I mean where the defendant is guilty of
165 negligence and that the plaintiff was guilty of negligence, where they answer both issues "Yes," then they give no damages, but under this act you are permitted to do it.)

To the foregoing charge in parentheses, defendant excepts.)

Exception No. 92.

(If you answer the second issue "Yes," that is, if he was guilty of contributory negligence, and so if you should answer the two issues "Yes" and come to the question of damages, you would assess his reasonable damages under the rule which I have laid down, and then you would make an allowance for his own negligence, and deduct that from his damages, if you find it was less than his damages. If you found it was equivalent, that would make his damages nothing, but if you found it was less, a reasonable allowance for his own negligence was less than the amount of his own damages, you would deduct it and find the result.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 93.

That is about all, gentlemen. You may take the case.

By Mr. DOUGLASS: We did not prove any medical expenses.

By the COURT: If you did not, then gentlemen, you will not include any medical expense.

(There is one of the instructions in which I perhaps left out something. I instructed you this way: The plaintiff alleges that in his complaint his train, 84, was ordered to meet train 81 at Grandy, and thta this caused the collision. The burden to show that train 84 was ordered to meet 81 at Grandy is upon the plaintiff, and if the plaintiff has failed to satisfy you by the preponderance of the evidence that he had an order to meet train 81 at Grandy, you will answer the issue of negligence "No." I say I gave you that instruc-
166 tion, but I should have added there that he must show that by the greater weight of the evidence. If the plaintiff has failed to satisfy you by the preponderance of the evidence that he had an order to meet train 81 at Grandy, this is what I should have added, or that the order was so negligently written as to be misleading when carefully read by one under these circumstances, then you would answer the issue of negligence "No;" in order words, when I

gave you the instructions I gave it positively as if he failed to show that he had an order to meet train 81 at Grandy, and I should have added the other feature of that issue, that if he failed to show that it was so negligently written that the word appeared to be Grandy. You will take that into consideration.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 94.

By Mr. SIMMS: With reference to medical expenses, I do not recall that we offered evidence as to expenses.

By the COURT: You will not consider medical expenses. or other expenses unless there is some evidence of it. They say there is none as to medical or other expenses.

By Mr. SIMMS: I will be glad if you will state to the jury that we have withdrawn the similarity of the names of the stations, the block system and the use of telephone communications.

By the COURT: (I should have stated in the beginning that the jury will not consider any evidence relating to the alleged negligence of the defendant, first, as to having and maintaining by the defendant two stations on his line of railway in close proximity with names so smilar in sound, and names so closely resembling that one might be easily taken for the other. They will not consider also the failure of the defendant to have in operation upon its said line from Norlina to Richmond a system of signals known as the block system, nor would they consider the use of telephone in-
167 stead of the telegraph. They are all withdrawn. I did not mention them as they were out of the case.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 95.

You may retire, gentlemen, and make up your verdict,

At 3:20 P. M., the jury having returned to the court room for further instructions, the following question is asked by Juror No. One:

"It seems that one or two of the jurors have understood it one way and the others another. It seems that part of the jurors say that they understand from your charge that if they were equally negligent, that the plaintiff gets nothing."

The Court thereupon gave the jury the following further instructions:

(I don't think I would put it just that way, but this way: If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you would answer that "Yes," and if you find that the plaintiff was guilty of contributory negligence as charged, you will answer that second issue "Yes," and then vou would assess the damages that he would be entitled to, and then deduct from that whatever amount you think would be proper for the contributory negligence.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 96.

(I perhaps did say that if you found that his contributory negligence amounted to as much as the amount of damages that it would be nothing, but I did not put it that way—if they were equally negligent that he would be entitled to nothing. It would not be that.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 97.

168 (But you would deduct a reasonable amount from the damages that you think that he would be entitled to from the damages as an allowance for contributory negligence. It would be for you to say whether it is less or whether it is equal. But I did not put it just that way—that if they were equally guilty of negligence—but that you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence a reasonable amount for contributory negligence. You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 98.

At 5:55 P. M., the jury not having returned a verdict, the judge sends for the jury.

By the COURT: (It is getting a little late, and I thought I would have an understanding with you. It is time that we were making some arrangements for the closing of the court, but the law provides that where an action is begun before Thursday that it may be continued into the next week, so I thought I would say to you, if there is no probability of your reaching a verdict this evening, I would just put you in charge of an officer and continue the court over until Monday morning, and in the meantime, if there is no objection, I will go out in the country this evening, and by consent the Clerk can take the verdict, if you agree upon a verdict between now and Monday morning. In the meantime, if there is any instruction you want, I can hear you now. I take it you understand the charge of the Court. I will have you comfortably provided for and looked after.)

To the foregoing charge in parentheses, defendant excepts.
Exception No. 99.

169 By JUROR NO. FIVE: It don't look like we are going to agree right away.

By the COURT: (I feel that I would have to keep you here until next week any way. You have been so long on it. I find sometimes when the jury—for instance, if you work on it until tonight and sleep comfortably, and if there is no objection, go to church tomorrow, I don't want you to go unless by consent, walk about and think about something else, and then come back to the case, it may be that your minds may be in a better condition. You see this case has got to be tried sometime. You are just as good a jury as any to agree about it. Don't quarrel with one another, don't get in that condition of mind when you say you are going to have your way, but listen to the other man and hear what he has to say about it, and see if you cannot bring your minds together. I am not trying to force you to do this. I don't try to force a jury, and I am not threatening you. I am not going to keep you here until you agree. I am just going to let you stay together a reasonable time and see

if it is possible for you to agree, and keep you comfortable during that time.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 100.

(I have known juries to go out and quit the case and think about something else, and come back in and agree upon their verdicts. You just don't want to get your minds in that condition when it is rebellious, but hear the other fellow and see if you cannot bring your minds together. In other words, don't get contrary, but remain in a receptive and persuasive condition of mind, so that you can hear and reason with the other man.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 101.

I don't feel like I ought to discharge you now when you have been out only 3 or 4 hours.

170 Now, that's the understanding. If you have not arrived at a verdict by 12 o'clock tonight, court is continued over for the purposes of this case and for no other purpose until Monday morning, but in the meantime, by consent, if you arrive at a verdict, the Clerk may take the verdict.

And now this further order. If there is no objection, if the jury arrive at a verdict, all orders and entries and judgments may be made on Monday morning, or during the next week here, week after next, the same as at this term.

By Mr. DOUGLASS: That is satisfactory to all of us.

By the COURT: You gentlemen must keep together, but if you want to walk about together you can do so, but do not separate.

I have seen some very good results from juries going out and getting some fresh air and seeing something, and getting their minds on something else, and then coming back and starting over again.

I had a jury recently, and I wish I had the opportunity for this jury to go down and see that picture, one of the finest oil paintings in the world, The Crucifixion. It was Saturday evening, and they said they could not agree, and they came in Monday morning with a verdict that was very satisfactory.

Those things happen sometimes, so understand. I am not trying to force you to a verdict, but only trying to see if I cannot aid you in arriving at a verdict.

The jury for their verdict answered the issues as follows:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint and amendment thereto?

A. Yes.

2. Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

A. Yes.

3. What damages is the plaintiff entitled to recover?

A. $7,000.00.

Upon the coming in of the verdict, defendant moved for
171 judgment non obstanti veredicto. Motion overruled. Defendant excepts.

Exception No. 102.

Defendant moves to set the verdict aside because the amount of damages awarded is excessive. Motion overruled. Defendant excepts.

Exception No. 103.

Defendant moves to set the verdict aside as against the weight of evidence. Motion overruled and defendant excepts.

Exception No. 104.

Defendant moves for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, and in the Court's charge to the jury and in the Court's refusal to give defendant's requests for instruction and in permitting amendment to complaint and withdrawal of causes of action by plaintiff at conclusion of all of the evidence. Motion overruled and defendant excepts.

Exception No. 105.

And thereupon judgment is rendered by the Court and entered and filed in this action as follows:

Judgment.

NORTH CAROLINA,
Wake County:

In the Superior Court, May Term, 1914.

(Title of Cause.)

This cause coming on to be heard before his Honor, O. H. Allen, judge, and a jury, at this, the May term, 1914, of the Superior Court of Wake County, and being tried, the following issues were submitted to the jury:

172 1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

2. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

3. What amount of damages is the plaintiff entitled to recover of the defendant?

And the jury having answered the first issue "Yes," the second issue "Yes," and the third issue "Seven thousand ($7,000) dollars," and it appearing to the Court that this action was brought and tried under the Employers' Liability Act enacted by Congress on the 22nd day of April, 1908, it is therefore,

Ordered, adjudged and decreed that the plaintiff, W. B. Tilghman, recover of the defendant, Seaboard Air Line Railway the sum of seven thousand ($7,000) dollars and the costs of this action to be taxed by the Clerk.

O. H. ALLEN,
Judge Presiding.

To the judgment signed by the Court the defendant excepts.

Exception No. 106.

Defendant in open court appeals to the Supreme Court.

Notice of appeal given in open court and further notice waived. Undertaking on appeal fixed in the sum of $50.00.

By consent defendant is allowed until July 11th, 1914, to file and serve statement of case on appeal and plaintiff allowed forty days thereafter to serve counter statement or exceptions.

EXHIBIT B.

The Clerk will send up the original order offered in evidence as Exhibit "B."

EXHIBIT C.

The Clerk will send up the original order offered in evidence as Exhibit "C."

173 EXHIBIT D.

Seaboard Air Line Railway.

Form 34. 19.

Form 34. 19.

Train Order No. 23.

SUPERINTENDENT'S OFFICE, 11-19, 1912.

For La Crosse, Va., Station to Conductor and Engineman of No. 81:

X — Opr., — M.
Order No. 9 is annulled.
No. 84 Eng. 91 will meet
No. 81 Eng. 93 at Granite.

J. H. W.

Made complete at 3:43 A. M.

PERKINSON, *Opr.*

Conductor and Engineman must each have a copy of this order.

EXHIBIT E.

Seaboard Air Line Railway.

Form 34. 19.

Form 34. 19.

Train Order No. 23.

SUPERINTENDENT'S OFFICE, 11-19, 1912.

For La Crosse, Va., Station to Conductor and Engineman of No. 81:

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Order No. 9 is annulled.
No. 84 Eng. 91 will meet
No. 81 Eng. 93 at Granite.

J. H. W.

Made complete at 3:43 A. M.

PERKINSON, *Opr.*

Conductor and Engineman must each have a copy of this order.

174 EXHIBIT F.

Jan. 6, 1913.

Mr. J. H. Witt, Supt. S. A. L. R. R.:

This is to certify that Capt. W. B. Tilghman was injured in a wreck on the 19th Nov., 1912. He has been unable to resume his duties on account of said injuries until the present time. He is now able to go back on his run.

Yours truly,

(Signed) B. L. HILLSMAN, M. D.

Assignments of Error.

NORTH CAROLINA,
Wake County:

In the Superior Court, May Term, 1914.

W. B. TILGHMAN
against
SEABOARD AIR LINE RAILWAY.

The defendant, Seaboard Air Line Railway, appellant, groups its exceptions and assigns the following errors:

1. For that the Court admitted the following testimony of the plaintiff's witness, J. A. Dodson, over defendant's objection and exception:

Q. Does that lessen the danger of collision?

By the COURT: I do not at present see the connection, so I will sustain the objection.

By Mr. DOUGLASS: We allege that the absence of the block system was one of the causes of the accident.

A. Very much so, and it places the responsibility on additional men other than the conductor and the engineer, and gives
175 additional protection. For example, had the Seaboard been operating under signal at this station Granite, would have been red, and would not have been changed to white until train No. 81 arrived. That is the protection that this train would have had under the absolute block that it did not have in the absence of it.

This is defendant's exception No. 1.

2. For that the Court overruled defendant's objection to the answer to the foregoing question upon the ground that it was not responsive to the question.

This is defendant's exception No. 2.

3. For that the Court admitted the following testimony of the plaintiff's witness, J. A. Dodson, over defendant's objection and exception.

Q. Has the Seaboard Railroad, or did it at that time in its operation have any part of its system under the absolute block system?

A. I think so. Yes, I think some of the districts were working

under the absolute block system. This block system was not in use at the time of this accident between Norlina and Richmond.

This is defendant's exception No. 3.

4. For that the Court excluded the following question asked plaintiff's witness, J. A. Dodson, on cross examination:

Q. Did they (referring to the railroad management) hold him responsible for this collision?

This is defendant's exception No. 4.

5. For that the Court excluded the following question asked plaintiff's witness, J. A. Dodson, on cross examination:

Q. They did not refuse to reinstate him on account of any physical condition?

This is defendant's exception No. 5.

6. For that the Court admitted the following testimony by plaintiff's witness, J. A. Dodson, over defendant's objection and exception:

176 Q. As to meeting points under the absolute block system, what is the rule with respect to signals?

A. Signals at block offices remain at danger.

This is defendant's exception No. 6.

7. For that the Court admitted the following testimony by plaintiff's witness, J. A. Dodson, over defendant's objection and exception:

Q. What does a white signal indicate?

A. Safety and notice to proceed.

This is defendant's exception No. 7.

8. For that the Court admitted the following testimony by the plaintiff, W. B. Tilghman, over defendant's objection and exception:

Q. After you received this order at that telegraph office at Norlina, and after, as you state, Mr. Beckham read it to you, and after you read it over to Mr. Bryant, did you have any doubt as to that meeting point in there being Grandy?

A. No, I had no doubt about it being Grandy.

This is defendant's exception No. 8.

9. For that the Court admitted the following testimony of plaintiff's witness, J. T. Horton, over defendant's objection and exception:

Q. Do you know whether or not that is in general and approved use on most of the railroads at the time of this collision or wreck? State whether it was.

A. It was in use on the roads I have been on. I have never been on any but the Norfolk & Western and the Seaboard.

This is defendant's exception No. 9.

10. For that the Court admitted the following testimony of plaintiff's witness, J. T. Horton, over defendant's objection and exception:

Q. Do you know whether or not that is—What is the block system? Explain the block system to the jury.

A. It is a piece of track between two open telegraph offices or stations. An absolute block—only one train is allowed in the block at the time.

This is defendant's exception No. 10.

11. For that the Court admitted the following testimony of
177 plaintiff's witness, J. T. Horton, over defendant's objection and exception:

Q. State if in your opinion it minimizes the danger of collision.
A. Yes.
This is defendant's exception No. 11.

12. For that the Court admitted the following testimony of plaintiff's witness, J. T. Horton, over defendant's objection and exception:
Q. Is it a safety appliance?
A. Yes.
This is defendant's exception No. 12.

13. For that the Court overruled defendant's objection to the deposition of Dr. B. W. Hillsman, offered in evidence by the defendant as follows:
At the time this deposition was offered in evidence, it was stated by plaintiff's counsel that efforts were being made to secure Dr. Hillsman's attendance in person, and that he would probably be in court as a witness on the following morning. Defendant's counsel objected to the deposition being read if Dr. Hillsman's attendance could be secured.
Objection overruled and defendant excepts.
This is defendant's exception No. 13.

14. For that the Court overruled defendant's objection to the deposition of Dr. B. W. Hillsman, offered in evidence by the defendant as follows:
Counsel for defendant stated that if the deposition was read because of the witness being beyond the limits of the state and not in attendance upon the court, the defendant would then enter its objection to reading the deposition and subsequently putting Dr. Hillsman on the stand to testify in person.
Objection overruled and defendant excepts.
This is defendant's exception No. 14.

15. For that the Court admitted the following evidence over defendant's objection and exception in the deposition of plaintiff's witness, Dr. B. W. Hillsman:
Q. Now, doctor, from your knowledge of Captain Tilghman before and after this injury and from your actual experience
178 and your examination and treatment of him what, in your opinion, was the cause of the appearance of the symptoms of locomotor ataxia in his case?
A. Well, I know of none of the usual text-book causes of locomotor-ataxia other than the injury to his nervous system, produced by this injury.
This is defendant's exception No. 15.

16. For that the Court admitted the following evidence over defendant's objection and exception in the deposition of plaintiff's witness, Dr. B. W. Hillsman:
Q. I wish you would please describe, doctor, as best you can, what is the character of locomotor ataxia, its progress and its usual effect on the human system.
A. Locomotor ataxia commences with the signs I have just enumerated above—the argla-robinson pupil and the Rhomberg symptoms and the peculiar gait with shooting pains in various portions of the body due to the hardening of the anterior columns of the cord.

It is a progressive disease and, up to the present time, incurable. I think Captain Tilghman had been in the hospital before he complained of the deafness to which I have referred.

This is defendant's exception No. 16.

17. For that the Court admitted the following evidence over defendant's objection and exception in the deposition of plaintiff's witness, Dr. B. W. Hillsman:

Q. Is it not a fact that the government will take people and the insurance companies solicit people who are deaf in one ear?

A. I think so.

This is defendant's exception No. 17.

18. For that the Court admitted the following evidence over defendant's objection and exception in the deposition of plaintiff's witness, Dr. B. W. Hillsman:

Q. Doctor, you can state in your opinion as a medical practitioner and surgeon, whether or not the injuries received by Captain Tilghman at the time are permanent or not.

A. From my observation of the cause I believe they are.

179 This is defendant's exception No. 18.

19. For that the Court over defendant's objection and exception excluded the following question asked defendant's witness, J. L. Watson:

Q. What was the order that you heard?

This is defendant's exception No. 19.

20. For that the Court over defendant's objection and exception excluded the following question asked defendant's witness, J. L. Watson:

Q. I ask you this. Wasn't it exactly the same order that was given to Norlina?

This is defendant's exception No. 20.

21. For that the Court admitted evidence by defendant's witness, Dr. A. S. Pendleton, on cross examination as follows:

If I should suppose that Captain Tilghman up to the 19th of November, 1912, was a man in good health, and a fine specimen of manhood, that up to that time he had no objective symptoms or no symptoms discoverable by himself of locomotor ataxia, that on the 19th of November, 1912, he was thrown half the length of a passenger car, bruised all over, back and arms, and suffered a wound or bruise on the left side of his head, about an inch and a half above his ear, that he remained in a dazed condition after that something like 8 or 10 days, and seemed to recover, but immediately after that soon after that he developed symptoms of locomotor ataxia, suppose he should state that he never had had any symptoms whatever of syphilis, suppose upon a triple plus examination of his blood, a negative examination of his blood, no traces of syphilis developed, I would say that the locomotor ataxia could not be produced by that traumatic injury.

The known facts in regard to the connection of syphilis and locomotor ataxia are changing so rapidly that any book that was published in German and translated into English would be out

180 of date so far as that particular item would appear by the time it would get among the doctors for reading. I do not believe that alcohol can cause it.

This is defendant's exception No. 21.

22. For that the Court permitted the following question to be answered by defendant's witness, Dr. A. S. Pendleton, on cross examination.

Q. I ask you if the very best authorities, German and American, up to the very time, now, don't hold that mental exertion, over exertion in any occupation, excitement and physical emotions, will produce locomotor ataxia?

A. A great many eminent authorities did hold that position some years ago.

This is defendant's exception No. 22.

23. For that the Court permitted the following question to be answered by defendant's witness, Dr. Albert Anderson, on cross examination:

Q. If you hit a man on the head slightly above the ear here, and it impairs his hearing in that ear, and puts him in a dazed condition about ten days, and leaves his hearing permanently impaired, you would say that the blow produced serious results?

A. Well, if upon examination I saw that there was evidence of hemorrhage, upon examination of the drum or external ear, or inner ear, was damaged from certain symptoms found, I should think he was permanently damaged in his hearing.

This is defendant's exception No. 23.

24. For that the Court admitted the following testimony on cross examination of defendant's witness, C. G. Shannonhouse, over defendant's objection and exception:

Q. What did he say, if anything?

A. I came up to him and I said, Tilly, where are your orders, and he raised his hand like that (illustrates) and he said, Go ahead, Beckham, go to Grandy. I said Beckham is dead or somewhere, and he said, I am going back to flag, and went immediately back. That is all the conversation that passed between us.

This is defendant's exception No. 24.

181 25. For that the Court, over defendant's objection and exception, permitted Dr. Hillsman to testify as witness for plaintiff after his deposition had been read in evidence by the plaintiff.

This is defendant's exception No. 25.

26. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. Describe what you found his condition to be?

A. I examined Captain Tilghman this morning, and found him with all the cardinal symptoms of locomotor ataxia. Argyll-Robertson pupil, Rhomburg symptoms, shooting pains, ataxic gait, a kind of the shuffling of the feet along, and analgesia loss of pain sensations in the lower limbs partially. I can take a pin and stick it up to the hub in Captain Tilghman's lower limbs and cause no pain. All of the cardinal symptoms—absence of the patella reflex absolutely. I gave him the Rhomburg test. The Rhomburg test is to put the patient's heels together, toes outward, close the eyes, and it is the

swaying motion, backward and forward, and keeping the eyes closed and bring the ends of the fingers together (illustrates with arms outstretched) and touch the end of the nose, like I am able to do. In my opinion he is suffering from locomotor ataxia.

This is defendant's exception No. 26.

27. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. What, in your opinion caused it?

A. In my opinion, by the process of exclusion, I believe the disease to be due to a trauma. I mean by that, an injury. An injury produced, which I attended him for, on the 19th of November, 1912, following a railroad accident.

This is defendant's exception No. 27.

28. For that the Court admitted the following testimony
182 of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. Where was the injury?

A. Only complaint was made as to an injury to the left side of the head, just above the ear. That was the only visible injury, but how much shaking up of the balance of the system, I don't know how much there was.

This is defendant's exception No. 28.

29. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. Since this last examination of him today, state what is your opinion as to his future condition as with respect to the locomotor ataxia inquired of?

A. The locomotor ataxia in his case I see no reason why it should not run the course as it does in everybody else—absolutely incurable and finally will kill him. In my opinion, in the condition I find him to be today, he is not able to perform the duties of a railway conductor. On January 6, 1913, he was just beginning to show the first signs of locomotor ataxia, and was in fairly good physical condition.

This is defendant's exception No. 29.

30. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. What did that indicate (referring to the Wasserman test)?

A. That he did not have syphilis.

This is defendant's exception No. 30.

31. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. State whether or not, in referring to the matter of alcohol and locomotor ataxia, state whether or not alcohol or alcoholism and, if so, to what extent, would produce locomotor ataxia.

A. I believe that chronic alcoholism can produce locomotor
183 ataxia, but there would be other as prominent symptoms as the locomotor ataxia from the alcohol. They would be

cirrhosis of the liver and breaking down of the heart from the cirrhosis of the liver. Captain Tilghman has none of those symptoms.

This is defendant's exception No. 31.

32. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. Did you discover in your examination of him, or any treatment of him, any evidence of chronic alcoholism?

A. I have never discovered any symptoms of chronic alcoholism in Captain Tilghman.

This is defendant's exception No. 32.

33. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

In my opinion, injury to the head will cause locomotor ataxia and for this reason: If an injury to the lumbar spine, which is here (indicating) can so far affect the brain as to produce an Argyll-Robertson pupil, I do not see why an injury to the brain, producing the Argyll-Robertson pupil, cannot affect the lumbar spine.

This is defendant's exception No. 33.

34. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. You used an expression in your testimony about excluding certain causes. What do you mean by the exclusion of certain causes in arriving at the reason of this man's locomotor ataxia, or the cause of any man's disease?

A. If a patient comes to me with symptoms pointing to cerebella spinal involvement, I would first eliminate alcohol by the history in the case, by examination of his liver and spine and kidneys, and if I could find no evidence of alcohol there, I would eliminate

syphilis as far as possible with the McGoochy test.

184 This is defendant's exception No. 54.

35. For that the Court admitted the answer by Dr. B. W. Hillsman, witness for plaintiff and refused to strike it out, over defendant's objection and exception:

Q. They asked you something in your disposition where they asked you if you had known that he was a heavy drinker, whether you would have considered that. State whether or not Captain Tilghman was a heavy drinker.

A. If I knew a man was a heavy drinker, and he gave me a history of a good deal of whiskey, and I could not find any evidence of cirrhosis of the liver and kidney produced by this alcohol, I would not exclude that as the cause of the locomotor ataxia; I would hunt other trouble, and if he did not have other trouble, I would go back to the alcoholism.

This is defendant's exception No. 35.

36. For that the Court admitted the following testimony of plaintiff's witness, Dr. B. W. Hillsman, over defendant's objection and exception:

Q. You stated that you have known him for years before his injury. State how his appearance and physical condition now compares with his appearance and physical condition before his injury in November, 1912?

A. Before this injury Captain Tilghman was as fine a specimen of manhood as I ever saw, big, robust man, muscular, and now he is a wreck.

This is defendant's exception No. 36.

37. For that the Court overruled defendant's specific objection to the foregoing answer.

This is defendant's exception No. 37.

38. For that the Court admitted the following testimony of the plaintiff's witness, Dr. H. W. Glasscock, over defendant's objection and exception:

Q. What did Captain Tilghman tell you about his condition? State any subjective symptoms.

Question by Mr. ALLEN: You mean by subjective what he told you?

A. Yes.

185 A. I found the analgesia loss of pain in the muscles and weakness. I discovered it by sticking the patient with a pin. The sense of touch was apparently good, but after you stuck the patient with a pin and it goes through the skin into the muscles, there was very little sense of pain.

This is defendant's exception No. 38.

39. For that the Court overruled defendant's objection to the testimony of Dr. H. W. Glasscock, as follows:

I stuck the pin half way to the head. He had other symptoms; the loss of strength in the extensory muscles, in the arm and legs. The muscles that extend the arm, the muscles pull back like that (illustrating). His strength is not normal with the extensories. The flexes were apparently good, all right, but the extensories were weak.

This is defendant's exception No. 39.

40. For that the Court admitted the following testimony of the plaintiff's witness Dr. H. W. Glasscock, over defendant's objection and exception:

Q. After your examination, Doctor, what was your opinion in respect to him with respect to locomotor ataxia?

A. My opinion as to locomotor ataxia, my opinion was since he had the cardinal symptoms or cardinal signs or manifestations of locomotor ataxia, that it was locomotor ataxia, after excluding other conditions or other symptoms, not finding any other symptoms or other diseases, particularly.

This is defendant's exception No. 40.

41. For that the Court admitted the following testimony of the plaintiff's witness Dr. H. W. Glasscock, over defendant's objection and exception:

Q. State whether, in your opinion, locomotor ataxia can be caused by traumatic injury to the head, left side of the head?

A. In my opinion it can be caused by tramma to the head.

This is defendant's exception No. 41.

42. For that the Court admitted the following testimony
186 of the plaintiff's witness Dr. H. W. Glasscock, over defendant's objection and exception:

Q. State to the jury, Doctor, whether or not there was anything developed in your examination of Captain Tilghman which lead you to the opinion that he was suffering from traumatic injury? I mean by that, whether there were any prior symptoms which would indicate an entire shake-up to the nervous system?

A. The man's general look and his characteristics in general the appearance of the man, his loss of flesh. I had never seen Captain Tilghman before until the other night, but feeling of his flesh, and skin, the man has apparently lost a great deal of flesh and his expression, his gait, his general make-up is quite characteristic of a man that has been in some shake-up of some kind.

This is defendant's exception No. 42.

43. For that the Court overruled defendant's specific objection to the foregoing answer.

This is defendant's exception No. 43.

44. For that the Court sustained plaintiff's objection to the following question asked plaintiff's witness, Dr. H. W. Glasscock by the defendant:

Q. Did you examine him for the purpose of testifying in this case?

This is defendant's exception No. 44.

45. For that the Court admitted the following testimony of plaintiff's witness, J. T. Bryant, over defendant's objection and exception:

Q. What does that look like to you? (Referring to framed copy of order.)

A. It can be taken for either one. (Referring to Granite and Grandy.)

This is defendant's exception No. 45.

46. For that the Court admitted the following testimony of plaintiff's witness, J. T. Bryant, over defendant's objection and exception:

Q. Was there any question in your mind about it looking like Grandy?

A. None at all.

187 This is defendant's exception No. 46.

47. For that the Court admitted the following testimony of plaintiff's witness, J. T. Bryant, over defendant's objection and exception:

Q. State whether or not those two short blasts indicated a go-ahead signal?

A. Yes.

This is defendant's exception No. 47.

48. For that the Court admitted the following testimony of the plaintiff, W. B. Tilghman, over defendant's objection and exception:

Q. Did you ever read that order that they gave to you, that meet order that night, anything except Grandy?

A. No.

This is defendant's exception No. 48.

49. For that the Court sustained plaintiff's objection to the following question asked plaintiff by the defendant:

Q. Where did you live at the time of this accident?

This is defendant's exception No. 49.

50. For that the Court submitted the following issues tendered by the plaintiff.

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint and the amendment thereto?

2. Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

3. What damages is the plaintiff entitled to recover of the defendant?

This is defendant's exception No. 50.

51. For that the Court refused to submit the following issues, or any of them, tendered by the defendant:

1. Was plaintiff injured by the negligent failure to have the block system, as alleged in the complaint?

2. If so, did plaintiff voluntarily assume the risk of being injured thereby?

3. Was plaintiff injured by using the telephone system to transmit orders, as alleged in the complaint?

188 4. Did plaintiff voluntarily assume the risk of being injured thereby?

5. Was plaintiff injured by negligence of the defendant in maintaining two stations named Grandy and Granite, as alleged in the complaint.

6. If so, did the plaintiff voluntarily assume the risk of being injured, as alleged in the answer.

7. Was the plaintiff injured by the negligence of the defendant in giving an order to train No. 81 to meet train No. 84 at Granite, and giving an order to train No. 84 to meet train No. 81 at Grandy?

8. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

9. What is the whole amount of damages, if any, sustained by the plaintiff by reason of the negligence of the defendant?

10. What amount, if any, shall be deducted from the damages sustained by the plaintiff as the portion thereof attributabl- to the plaintiff's own negligence?

This is defendant's exception No. 51.

51½. For the Court permitted plaintiff to withdraw from his complaint as follows:

"The plaintiff withdraws from his complaint paragraphs A, B and C; and; under paragraph A, matter pertaining to the block system, phone system, and similarity of names of stations, and requests that the evidence bearing upon the same be withdrawn from the jury."

This is defendant's exception No. 51½.

52. For that the Court permitted plaintiff at the conclusion of all the evidence to amend his complaint by adding the following as paragraph 8 (F):

"In that the defendant negligently delivered to the plaintiff at Norlina, N. C., and at the said time the train order aforesaid for the

meeting of his said train No. 84 with train No. 81 written in such form and manner that if the same was intended to refer to any other meeting place than "Grandy," nevertheless, the same was so negligently written that the word appeared -o be "Grandy;"
189 and in that when the plaintiff read his said train order to the defendant before leaving Norlina, as he did so read it aloud in a plainly audible and distinct tone of voice, 'Grandy,' the defendant negligently assented to and approved the said reading and pronunciation of the said 'Grandy;' and in that thereafter and before the plaintiff's said train reached the station Granite, N. C., the defendant negligently twice read the said train order to the plaintiff and each time read and pronounced the same in respect to the meeting place therein designated 'Grandy.'"

This is defendant's exception No. 52.

53. For that the Court at the conclusion of all the evidence permitted plaintiff over defendant's objection and exception to withdraw from his complaint paragraphs 8 (*a*), 8 (*b*), and 8 (*c*), and all matter in paragraph 8 pertaining to the block system, 'phone system and similarity of names of stations. Paragraphs 8 (*a*), 8 (*b*), and 8 (*c*) are as follows:

"8. That said head-on collision, wreck and injury and damage to the plaintiff was caused by the negligence of the defendant in the following particulars, to-wit:

"(*a*) In that it negligently and carelessly had and maintained two stations upon its single line of railway in close proximity with names so similar in sound and so closely resembling each other in chirography that one might very easily be mistaken for the other.

"(*b*) In that it negligently and carelessly failed to have in operation upon its said line of railway from Norlina, North Carolina, to Richmond, Virginia, a system of signals known as the 'Block System,' to control the operation and movement of its trains, which said system is a preventive of collisions and accidents and a protection to employees and passengers, and which said 'Block System' was at said time, and is now, approved and in general use by railroads.

"(*c*) In that it negligently and carelessly operated its trains 'Number 84' and 'Number 81' upon telephonic communi-
190 cation, depending entirely upon the proper understanding of the said train orders communicated from Richmond, Virginia, and upon the correct transcription of the said train orders by the operator and agent of the defendant at Norlina, North Carolina."

This is defendant's exception No. 53.

54. For that the Court refused to instruct the jury as follows, as requested by defendant:

1. There is no evidence of negligence on the part of the defendant in failing to have the block system in operation between Norlina and Richmond, and you will answer the first issue "No."

This is defendant's exception No. 54.

55. For that the Court refused to instruct the jury as follows, as requested by defendant:

2. There is no evidence that the defendant was negligent in

using the telephone system of communicating train orders on its line between Norlina and Richmond, and you will answer the third issue "No."

This is defendant's exception No. 55.

56. For that the Court refused to instruct the jury as follows, as requested by defendant:

3. There is no evidence that the defendant negligently and carelessly had and maintained two stations upon its single line of railway in close proximity with names so closely resembling each other in chirography that one might very easily be mistaken for the other, and you will answer the fifth issue "No."

This is defendant's exception No. 56.

57. For that the Court refused to instruct the jury as follows, as requested by defendant:

4. There is no evidence that plaintiff was injured by the defendant's having and maintaining two stations named Grandy and Granite and you will answer the fifth issue "No."

This is defendant's exception No. 57.

191 58. For that the Court refused to instruct the jury as follows, as requested by defendant:

5. The burden of proof is upon the plaintiff on the seventh issue to satisfy you by the preponderance of the evidence that the defendant negligently and carelessly gave an order to the plaintiff, W. B. Tilghman, for train No. 84 to meet train No. 81 at Grandy and unless you are so satisfied you will answer the seventh issue "No."

This is defendant's exception No. 58.

59. For that the Court refused to instruct the jury as follows, as requested by defendant:

6. If you find from the evidence that the plaintiff, Tilghman, received an order similar to the one delivered to Engineer Beckham and that the order read for trains No. 84 and No. 81 to meet at Granite, then the plaintiff was guilty of contributory negligence, and you will answer the eighth issue "Yes."

This is defendant's exception No. 59.

60. For that the Court refused to instruct the jury as follows, as requested by defendant:

7. If you find that plaintiff was injured by the defendant's negligence, and if you find the facts to be true as testified to by the plaintiff Tilghman, he was guilty of contributory negligence, and you will answer the eighth issue "Yes."

This is defendant's exception No. 60.

61. For that the Court refused to instruct the jury as follows, as requested by defendant:

8. Upon the plaintiff's own evidence the Court instructs you that if you find that he received an order for train No. 84 to meet train No. 81 at Grandy and that the order was of such a doubtful character that it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was and if he had done so the collision would have been prevented, then his failure to stop at Granite was negligence on his part and if you find that it was

192 the sole proximate cause of the injury you will answer the issue of negligence "No."

This is defendant's exception No. 61.

62. For that the Court refused to give the following instruction in the language requested and modified it by adding after the word "Grandy" in line five the following: "or was so negligently written that it appeared to be Grandy upon a careful reading of it."

9. Before you can answer the issue of negligence in ordering train No. 84 to meet train No. 81 at Grandy the plaintiff must satisfy you by the preponderance of the evidence that the order delivered by the operator at Norlina to the plaintiff Tilghman read as the meeting place "Grandy," and if the plaintiff has failed to show by a preponderance of the evidence that his order was to meet at "Grandy," you will answer the issue of negligence in favor of the defendant "No."

This is defendant's exception No. 62.

63. For that the Court refused to instruct the jury as follows, as requested by defendant:

10. The plaintiff alleges in his complaint that his train No. 84 was ordered to meet train No. 81 at Grandy and that this caused the collision. The burden to show that train No. 84 was ordered to meet No. 81 at Grandy is upon the plaintiff, and if the plaintiff has failed to satisfy you by a preponderance of the evidence that he had an order to meet train No. 81 at Grandy, you will answer the issue of negligence "No."

This is defendant's exception No. 63.

64. For that the Court refused to give the following instruction in the language requested, and modified it by adding after the word "order" in line five, the following: "unless the order shows that a careful reading would mislead," and by adding after the word "No" at the end the following: "as to that phase of the case."

11. In this action the plaintiff having alleged that he had an order for his train No. 84 to meet train No. 81 at Grandy,
193 the burden is on the plaintiff to show this by the greater weight of the evidence and he cannot show it by satisfying you that he misread an order; but he must satisfy you by the preponderance of the evidence that the defendant negligently ordered his train to meet the train No. 81 at Grandy, and if he has failed to so satisfy you, you will answer the issue of negligence "No."

This is defendant's exception No. 64.

65. For that the Court refused to instruct the jury as follows, as requested by the defendant:

12. If you find from the evidence that the plaintiff had a doubt as to whether the order received by him read "Grandy," it was his duty to stop at the first station unless he had found this doubt before leaving Norlina, in which case it was his duty to remain at Norlina until all doubt could be removed. If you find that the plaintiff had such doubt and did not pursue the safe course, you should answer the issue of contributory negligence "Yes," and in considering whether the plaintiff had such doubt you should consider his testimony and the testimony of his baggage master, which the defendant contends show such doubt.

This is defendant's exception No. 65.

66. For that the Court refused to instruct the jury as follows, as requested by defendant:

13. The Court instructs you that the mere proof of a collision in this case is not in itself sufficient to establish negligence on the part of the defendant, and unless you further find by the preponderance of the evidence that this collision was caused by the negligence of the defendant in giving the plaintiff an order for train No. 84 to meet train No. 81 at Grandy, you will answer the issue of negligence "No."

This is defendant's exception No. 66.

67. For that the Court refused to instruct the jury as follows, as requested by defendant:

14. If you find from the evidence that the order offered in evidence by the defendant is a copy of the order which was
194 delivered to Conductor Tilghman, you will answer the seventh issue "No."

This is defendant's exception No. 67.

68. For that the Court refused to instruct the jury as follows, as requested by defendant:

15. If you find from the evidence that the order offered in evidence by the defendant is a copy of the order which was delivered to Conductor Tilghman and that the order offered in evidence does not read "Grandy," you will answer the seventh issue "No," and in order to do this it is not necessary for you to find that the order in evidence reads "Granite," as the burden would be upon the plaintiff to show you by the preponderance of the evidence that this order reads "Grandy."

This is defendant's exception No. 68.

69. For that the Court refused to instruct the jury as follows, as requested by defendant:

16. Upon all the evidence, the Court instructs you to answer the second issue "Yes."

This is defendant's exception No. 69.

70. For that the Court refused to instruct the jury as follows, as requested by defendant:

17. Upon all the evidence, the Court instructs you to answer the fourth issue "Yes."

This is defendant's exception No. 70.

71. For that the Court refused to instruct the jury as follows, as requested by defendant:

18. Upon all the evidence, the Court instructs you to answer the sixth issue "Yes."

This is defendant's exception No. 71.

72. For that the Court refused to instruct the jury as follows, as requested by defendant:

19. The Court instructs you that in answering the issue of negligence you cannot consider the evidence that the name of the station of Granite has been changed to Paschall since this collision,
195 because the change in the name of the station by defendant is not evidence of negligence.

This is exception No. 72.

73. For that the Court refused to instruct the jury as follows, as requested by defendant:

20. Under the Federal Employers' Liability Act, proof of the collision in this case is not sufficient in itself to establish negligence, and the burden of proof is still upon the plaintiff to satisfy you by a preponderance of the evidence that the collision was caused by the negligence of the defendant.

This is defendant's exception No. 73.

74. For that the Court refused to instruct the jury as follows, as requested by defendant:

21. If you believe the evidence of the plaintiff and of his witness, J. T. Bryant, you will answer the issue of contributory negligence "Yes."

This is defendant's exception No. 74.

75. For that the Court refused to instruct the jury as follows, as requested by defendant:

22. Upon all the evidence, the Court instructs you to answer the issue of contributory negligence "Yes."

This is defendant's exception No. 75.

76. For that the Court refused to instruct the jury as follows, as requested by defendant:

23. If you find from the evidence that plaintiff was given an order by the defendant's operator for train No. 84 to meet train No. 81 at Granite, you will answer the issue of negligence "No."

This is defendant's exception No. 76.

77. For that the Court refused to instruct the jury as follows, as requested by defendant:

24. If you find from the evidence that this collision was caused by the failure of the plaintiff to observe the rules of the defendant company, you will answer the issues of negligence "No."

This is defendant's exception No. 77.

196 78. For that the Court refused to instruct the jury as follows, as requested by deendant:

25. If you find from the evidence that the plaintiff was in doubt as to the meeting point of train No. 84 with train No. 81, and should further find that defendant's rules required him, in case of doubt, to pursue the safe course, and you should find that the safe course would have been to have stopped his train at Granite, and that by stopping his train at Granite, the collision would have been prevented and the plaintiff would not have been injured, you will answer the issue of negligence "No."

This is defendant's exception No. 78.

79. For that the Court refused to instruct the jury as follows, as requested by defendant:

26. If you find from the evidence that the rules of the defendant required the plaintiff in case of doubt or uncertainty to take the safe course and that the safe course would have been to have stopped train No. 84 at Granite, and that by stopping at Granite, the collision would have been prevented, you will answer the issue of negligence "No."

This is defendant's exception No. 79.

80. For that the Court refused to instruct the jury as follows, as requested by defendant:

27. It was the duty of the plaintiff under the rules of the defendant, in case of doubt or uncertainty as to the meeting point of train No. 84 with train No. 81, to have stopped his train at Granite and if you find that he was in doubt or uncertainty as to such meeting point and his failure to stop at Granite was the proximate cause of his injury, you will answer the issue of negligence "No."

This is defendant's exception No. 80.

81. For that the Court refused to instruct the jury as follows, as requested by defendant:

28. If you find that the injuries to plaintiff resulted from one of the risks ordinarily incident to the work in which he was
197 engaged, you will answer the issue of assumption of risk "Yes."

This is defendant's exception No. 81.

82. For that the Court instructed the jury as follows:

Then there is a second allegation embraced in the amended complaint, which is similar to the first, but is to the effect that the order was so negligently written that the word appeared to be Grandy even though it might have been intended to be Granite, and that on that account, if not on the first, and on the one or the other, the negligence in either putting it Grandy, or negligently writing it so it appeared to be Grandy, the trains collided, and the plaintiff was injured."

This is defendant's exception No. 82.

83. For that the Court instructed the jury as follows:

"If the jury find from the evidence that the defendant negligently delivered to the plaintiff an order that his train No. 84 should meet train No. 81 at a station, Grandy, and negligently gave to the conductor of train No. 81 an order to meet train No. 84 at Granite, and that this negligence on the part of the defendant was the proximate cause of the plaintiff's injury, and is established by the greater weight of the evidence, you will answer the first issue "Yes."

This is defendant's exception No. 83.

84. For that the Court instructed the jury as follows:

"In considering that first phase of it, that is, that it was written Grandy, or the same principle would apply if it was so negligently written that upon a proper examination of it, and I should say that that means a careful examination of it by the conductor, under those circumstances, and it then still appearing to be Grandy, then this same instruction would apply, if the facts are established by the greater weight of the evidence, and if they are not so established by the greater weight of the evidence, then your answer to the first issue should be "No."

This is defendant's exception No. 84.

198 85. For that the Court instructed the jury as follows:

"That is to say, you take the evidence and weigh it in your minds, not according to the greater number of the witnesses but according to the greater weight of the evidence, its weight and force, and if the evidence shows by the greater weight that that order read

Grandy, or that that order was so negligently written, so defectively written, that one in the capacity of a conductor and receiving orders of that importance, after carefully examining it, construed it reasonably to be Grandy and not Granite, and I say that if that is established by the greater weight of the evidence, you will answer it "Yes," and if it is not established by the greater weight of the evidnce, you will answer it "No." This is defendant's exception No. 85.

86. For that the Court instructed the jury as follows:

"In considering the evidence, if the jury find from the evidence the plaintiff received his order to meet the train and read same to the defendant and pronounced the last word of said order Grandy, and if the defendant so heard it and assented thereto, and if the jury further find from the evidence that the defendant had delivered an order to train 81 to meet the plaintiff's train 84 at Granite, then these matters would be evidence for your consideration in saying whether the injury was caused by the negligence of the defendant.

This is defendant's exception No. 87.

87. For that the Court instructed the jury as follows:

"And so if the jury finds from the evidence that the plaintiff read the train order received by him and relating to the meeting of trains Nos. 84 and 81 to the defendant's operator at Norlina, and pronounced the name of the meeting place as Grandy, and if the jury shall further find from the evidence that the meeting place intended by the defendant to be designated by said order was in fact Granite, and shall further find from the evidence that the said operator of the defendant at Norlina failed to correct the plaintiff's said
199 reading and understanding of said order, then these are matters of evidence which the jury will consider upon passing upon this time as to the negligence."

This is defendant's exception No. 87.

88. For that the Court instructed the jury as follows:

"And the same as to the reading of the order by the engineer. If he read it Grandy, and you find he did, it is evidence to be considered in saying whether the injury was caused by negligence or not, and it is also evidence in saying, in passing upon the question as to whether the plaintiff negligently read the order, bearing upon negligence in that respect as I have just indicated, but before you can answer the issue of negligence with reference to ordering the train 84 to meet train 81 at Grandy, the plaintiff must satisfy you by the preponderance, that is the greater weight of the evidence, that the order delivered by the operator at Norlina to the Plaintiff Tilghman read as the meeting place Grandy, or at least was so negligently written that it appeared to be Grandy upon a careful reading of the same."

This is defendant's exception No. 88.

89. For that the Court instructed the jury as follows:

"Now, upon the plaintiff's evidence, if you find that he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was of such a nature, of such a doubtful character that it was uncertain as to whether it was Grandy or Granite, then it was his duty to have stopped at Granite for the purpose of ascertaining defi-

nitely what the order was, and if you find that to be the fact, and that if he had done so the collision would have been prevented, and that his failure to stop at Granite under the circumstances was negligence on his part, and that it was the proximate cause of the injury, you would answer the second issue, 'Yes,' if shown by the greater weight of the evidence. If you find from the evidence that the plaintiff had a doubt as to whether the order received by him read Grandy, or if there was reasonable grounds for him to doubt it, it was
200 his duty to stop at the first station, unless he had found this doubt out or had reasonable grounds to find it out before leaving Norlina, in which case it was his duty to remain at Norlina until all reasonable doubt was removed. And so if you find that he had such doubt, or reasonable grounds for it, and did not pursue the safe course, and that by reason *for* his failure to do so the collision occurred, that that was the proximate cause of it, then you will answer the issue as to contributory negligence, 'Yes.' And you would consider all the evidence throwing any light upon that question, both the defendant's evidence, the plaintiff's evidence, and the evidence of the baggagemaster and all the other witnesses, that throw any light upon the question."

This is defendant's exception No. 89.

90. For that the Court instructed the jury as follows:

"Upon the third issue, What damage is the plaintiff entitled to recover, the rule is this. He would be entitled to recover, if entitled at all, for past and prospective loss resulting from the wrongful act of the defendant, including indemnity for actual expense, if there is any evidence of actual expense, incurred for medical attention, loss of time from inability to perform mental or physical labor, if there is any evidence bearing upon the inability to perform mental or physical labor, and incapacity to earn money and for actual suffering of body and mind when they are the immediate and necessary consequence of the negligent injury.

This is defendant's exception No. 90.

91. For that the Court instructed the jury as follows:

"Then, in passing upon this issue as to damages, one of the very important matters connected with it is this question of the disease which it is contended he has now, locomotor ataxia, and you are to consider as to whether it has been established by the greater weight of the evidence that it resulted from this injury. Quite a controversy there, the plaintiff contending that it is the result of the injury, and the defendant contending that it is the result of some
201 other cause, either the use of intoxicants or some lurking disease which was already there, and the plaintiff contending that even if it was already there, it was precipitated by the injury, but you are to consider as to whether it has been established by the greater weight of the evidence that it resulted from this injury, and, if so, then you take it into consideration in fixing the amount of damages, if you reach the issue on damages."

This is defendant's exception No. 91.

92. For that the Court instructed the jury as follows: "And now another question comes in here, which is interesting because it is of

recent application in our laws. I have some times said, if the gentlemen will pardon me for saying so, that the jury have for many years been unconsciously applying it, but under this act under which this action is brought you are permitted to apply it if you find that he was guilty of contributory negligence. Ordinarily, when the jury have found that the defendant was guilty of contributory negligence, I mean where the defendant is guilty of negligence and that the plaintiff was guilty of negligence, where they answer both issues 'Yes,' then they give no damages, but under this act you are permitted to do it."

This is defendant's exception No. 92.

93. For that the Court instructed the jury as follows: "If you answer the second issue 'Yes,' that is, if he was guilty of contributory negligence, and so if you should answer the two issues, 'Yes,' and come to the question of damages, you would assess his reasonable damages under the rule which I have laid down, and then you would make an allowance for his own negligence, and deduct that from his damages, if you find it was less than his damages. If you found it was equivalent, that would make his damages nothing, but if you found it was less, a reasonable allowance for his own negligence was less than the amount of his own damages, you would deduct it and find the result."

202 This is defendant's exception No. 93.

94. For that the Court instructed the jury as follows: "There is one of the instructions in which I perhaps left out something. I instructed you this way. The plaintiff alleges that in his complaint his train 84 was ordered to meet train 81 at Grandy, and that this caused the collision, the burden to show that train 84 was ordered to meet 81 at Grandy is upon the plaintiff, and if the plaintiff has failed to satisfy you by the preponderance of the evidence that he had an order to meet train 81 at Grandy, you will answer the issue of negligence, 'No.' I say I gave you that instruction, but I should have added there that he must show that by the greater weight of the evidence. If the plaintiff has failed to satisfy you by the preponderance of the evidence that he had an order to meet train 81 at Grandy, that is what I should have added, or that the order was so negligently written as to be misleading when carefully read by one under these circumstances, then you would answer the issue of negligence 'No;' in other words, when I gave you the instruction I gave it positively as if he failed to show that he had an order to meet train 81 at Grandy, and I should have added the other feature of that issue, that if he failed to show that it was so negligently written that the word appeared to be Grandy. You will take that into consideration."

This is defendant's exception No. 94.

95. For that the Court instructed the jury as follows: "I should have stated in the beginning that the jury will not consider any evidence relating to the alleged negligence of the defendant, first, as to having and maintaining by the defendant two stations on *his* line of railway in close proximity with names so similar in sound, and names so close- resembling that one might be easily taken for

the other. They will not consider also the failure of the defendant to have in operation upon its said line from Norlina to Richmond a system of signals known as the block system, nor
203 would they consider the use of telephones instead of the telegraph. They are all withdrawn. I did not mention them as they were out of the case."

This is defendant's exception No. 95.

96. For that the Court instructed the jury as follows: "I don't think I would put it that way, but this way. If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you would answer that 'Yes,' and if you find that the plaintiff was guilty of contributory negligence as charged, you will answer that second issue 'Yes,' and then you would assess the damages that he would be entitled to, and then deduct from that whatever amount you think would be proper for the contributory negligence."

This is defendant's exception No. 96.

97. For that the Court instructed the jury as follows: "I perhaps did say that if you found that his contributory negligence amounted to as much as the amount of damages that it would be nothing, but I did not put it that way—if they were equally negligent that he would be entitled to nothing. It would not be that."

This is defendant's exception No. 97.

98. For that the Court instructed the jury as follows: "But you would deduct a reasonable amount from the damages that you think that he would be entitled to from the damages as an allowance for contributory negligence. It would be for you to say whether it is less or whether it is equal, but I did not put it just that way—that if they were equally guilty of negligence—but that you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence a reasonable amount for contributory negligence. You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct
204 that from the amount of damages.

This is defendant's exception No. 98.

99. For that the Court instructed the jury as follows:

"It is getting a little late, and I thought I would have an understanding with you. It is time that we were making some arrangements for the closing of the court, but the law provides that where an action is begun before Thursday that it may be continued into the next week, so I thought I would say to you, if there is no probability of your reaching a verdict this evening, I would just put you in charge of an officer and continue the court over until Monday morning, and in the meantime, if there is no objection, I will go out in the country this evening, and by consent the clerk can take the verdict, if you agree upon a verdict between now and Monday morning. In the meantime, if there is any instruction you want, I can hear you now. I take it you understand the charge of the court. I will have you comfortably provided for and looked after."

This is defendant's exception No. 99.

100. For that the Court instructed the jury as follows: "I feel that I would have to keep you here until next week any way. You have been so long on it. I find some times when the jury—For instance if you work on it until tonight and sleepp comfortably, and if there is no objection, go to church tomorrow, I don't want you to go unless by consent, walk about and think about something else, and then come back to the case, it may be that your minds may be in a better condition. You see this case has got to be tried some time. You are just as good a jury as any to agree about it. Don't quarrel with one another, don't get in that condition of mind when you say you are going to have your way about it, and see if you can not bring your minds together. I am not trying to force you to do this. I don't try to force a jury, and I am not threatening you. I am not going to keep you here until you agree. I am just going to let you stay together a reasonable time
205 and see if it is possible for you to agree, and keep you comfortable during that time."

This is defendant's exception No. 100.

101. For that the Court instructed the jury as follows: "I have known juries to go out and quit the case and think about something else, and come back in and agree upon their verdicts. You just don't want to get your minds in that condition when it is rebellious, but hear the other fellow and see if you can not bring your minds together. In other words, don't get contrary, but remain in a receptive and persuasive condition of mind so that you can hear and reason with the other man."

This is defendant's exception No. 101.

102. For that the Court overruled defendant's motion for judgment non obstanti verdicto, upon the coming in of the verdict.

This is defendant's exception No. 102.

103. For that the Court overruled defendant's motion to set aside the verdict because the amount of damages awarded was excessive.

This is defendant's exception No. 103.

104. For that the Court overruled defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, and in the Court's charge to the jury and in the Court's refusal to give defendant's requests for instructions and in permitting amendment to complaint and withdrawal of causes of action by plaintiff at conclusion of all the evidence.

This is defendant's exception No. 105.

106. For that the Court signed judgment as follows:

"This cause coming on to be heard before his Honor O. H. Allen, Judge, and a jury, at this the May Term, 1914, of the Superior Court of Wake County, and being tried, the following issues were submitted to the jury:

206 1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

2. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer?

3. What amount of damages is the plaintiff entitled to recover of the defendant?

And the jury having answered the first issue 'Yes,' the second issue 'Yes,' and the third issue 'Seven Thousand ($7,000) Dollars, and it appearing to the Court that this action was brought and tried under the Federal Employers' Liability Act enacted by Congress on the 22nd day of April, 1908, it is therefore,

Ordered, adjudged and decreed that the plaintiff, W. B. Tilghman, recover of the defendant, Seaboard Air Line Railway, the sum of seven thousand ($7,000) dollars and the costs of this action to be taxed by the clerk."

This is defendant's exception No. 106.

MURRAY ALLEN,
Attorney for Defendant.

The foregoing is tendered by the defendant as its statement of case on appeal.

MURRAY ALLEN,
Attorney for Defendant.

Service of the foregoing statement of case on appeal is hereby accepted, copy having been received. This 10th day of July, 1914.

DOUGLASS & DOUGLASS,
Attorneys for Plaintiff.

Defendant having served statement of case on appeal and plaintiff having served exceptions thereto, and the Court having considered the said statement by defendant and exceptions by plaintiff, counsel for defendant and plaintiff being present, the fore-
207 going statement of case on appeal as amended by plaintiff's exceptions allowed as shown on the margin thereof constitutes the case on appeal to the Supreme Court. Defendant is allowed to amend its assignment of errors to conform to the case on appeal as settled.

O. H. ALLEN,
Judge Presiding.

Wilmington, N. C., Sept. 21st, 1914.

Clerk's Certificate.

NORTH CAROLINA,
Wake County:

I, Millard Mial, Clerk of the Superior Court of Wake County, North Carolina, do certify that the foregoing contains a full, true and correct transcript of the record in an action lately pending in said Court between W. B. Tilghman, plaintiff, and Seaboard Air Line Railway, defendant, including plaintiff's exceptions to defendant's statement of case on appeal as allowed by the Court, as shown on the margin thereof.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Court at office in Raleigh, this 2nd day of October, 1914.

MILLARD MIAL,
[SEAL.] *Clerk Superior Court.*

208 *Docket Entries.*

Appeal docketed October 2, 1914.
Argued October 16, 1914.
Opinion by Clark, C. J. November 5, 1914, and Dissenting opinion by Walker, J. November 5, 1914, as follows:

209 North Carolina Supreme Court, Fall Term, 1914.

Wake.

#255.

W. B. TILGHMAN
v.
SEABOARD AIR LINE R. R.

Appeal from Allen, J. at May Term, 1914.

R. N. Simms, and Douglass & Douglass for Plaintiff.
Murray Allen for Defendant.

CLARK, *C. J.*:

A large number of the assignments of error have been abandoned by failure of the appellant to make any argument or reference thereto in its brief. Rule 34. This is as it should be. During the progress of the cause counsel out of the abundance of caution necessarily take a great many exceptions which on fuller examination cannot be sustained and in such case they should neither clog the brief or divert the attention of the Court from the vital errors alleged therein. One vital error is sufficient to secure a new trial and there is no necessity of urging a large number of exceptions on the attention of the Court when it will be more effective to concentrate the argument on those exceptions in which the counsel have the most confidence.

The following exceptions are thus abandoned. 1, 4, 5, 7, 8, 19, 20, 21, 22, 23, 24, 28, 30, 31, 32, 34, 35, 38, 39, 40, 41, 42, 43, 47, 48, 49, 58, 59, 60, 65, 72, 74, 75, 86, 87, 91 and 94.

Exceptions 3, 6, 9, 19, 11 and 12 were to evidence relating to the "block system" and the Judge expressly withdrew the same and instructed the jury not to consider it, after he had made an order allowing the plaintiff to strike out the allegations in the complaint relating to the block system and this had been done.

Exceptions 13 and 14 cannot be sustained for it was competent

to read the depositions as the witness was at the time absent in Virginia. Exceptions 15, 16, 18, 26, 27, and 29 to the admission of evidence are overruled. In neither of them are there an exception to the answer and as to the last five exceptions the witness was
210 admitted as an expert. Exception 25 was because the court in its discretion permitted the witness to be examined orally tho' his deposition had been previously read. If the witness had testified orally, it would have been in the discretion of the Judge to have permitted him to be recalled and the same is true here.

Exception 33 was to a pertinent question to the expert witness in opposition to the testimony of the expert witnesses of the defendant. Nor do we find any sound reasons in favor of exceptions 36 and 37. The witness was an expert. Exception 44 is to a question asked on recross-examination and permission to do so was entirely in the discretion of the Court. Exception 45 was to the plaintiff's inquiry of the witness, Bryant, as to the paper introduced in evidence by the defendant purporting to be the train orders governing the plaintiff's action. The plaintiff contended that such paper was not genuine. This was not a question of an expert on handwriting but merely required the witness who had seen and inspected the original to state whether or not this alleged carbon copy looked like the original.

Exception 46 is because the plaintiff who had been fully examined whether he had any doubt about the correct reading of the writing was permitted to say that the paper writing looks nearer like the one he saw, and that at the time of reading it he had no doubt that it read that the train should pass at "Grandy."

Exception 50 was to the three issues submitted, which were the usual issues of negligence, contributory negligence and damages which have been so often approved by the Court.

Exception 51 was to the refusal to submit the 10 issues tendered by the defendant. The first 6 related to the assumption of risk which had been withdrawn from the complaint and excluded from the consideration of the jury.

Issues 7 and 8 were substantially the same as 1 and 2 which were submitted. The 9th and 10th issues tendered are covered by the 3rd issue which was submitted. Exceptions 51½ and 52 are to the permission accorded the plaintiff to amend his complaint. This was discretionary, Rev. 507. Exception 53 is the same as 52½
211 Exceptions 54, 55, 56 and 57 were to instructions requested as to the block system, telephone system and the names of the stations which were properly refused because the Court had stricken out those matters from the complaint and withdrawn the evidence relating thereto from the consideration of the jury. Exception 61 to the refusal of an instruction that upon plaintiff's own evidence his failure to stop at Granite was negligence on his part cannot be sustained.

As to exceptions 62, 63, 64, 67 and 68, the defendant in his brief practically concedes that they cannot be sustained. As to exception 66 the instruction asked could not have been given after the amendment of the complaint.

Exceptions 69, 70 and 71 cannot be sustained because they related

to instructions upon issues 2, 4 and 6 tendered by the defendant which were not submitted to the jury because they related to the assumption of risk which had been stricken out of the case.

The prayer referred to in exception 72 was substantially given by the Court as follows: "A mere proof of a collision is not in itself sufficient to establish negligence on the part of the defendant, and unless you find by the preponderance of that evidence that this collision was caused by negligence of the defendant, you must answer this issue "No." It is prima facie negligence.

Marcon v. R. R., 126 N. C., 200; Skipper v. Lumber Co., 158 N. C., 324.

The exceptions to refusals to charge and to certain paragraphs of the charge need not be discussed more fully.

The whole case turns upon the question whether there was negligence of the defendant, or of the plaintiff, or of his fellow servants in that a train order for train #81 to meet train #84 was written to pass at "Granite" or at "Grandy," or by the negligence of the operator at Norlina, the word "Granite" was so written as to be mistaken for the word "Grandy." By reason of this mistake, however it was caused, a head on collision took place to the injury and dam-
212 ages of the plaintiff as he alleges, but which the defendant denies. These were almost entirely controveries of fact and while there were numerous exceptions as to the law, we do not perceive any errors in the conduct of the cause by the presiding Judge which entitles the defendant to a new trial. There can be no benefit derived from a more minute discussion of the assignments of error.

This action was under the Federal statute which authorizes the jury to abate the allowance of damages in proportion to the contributory negligence, if any, of the plaintiff. We cannot concur with the defendant's counsel that the Judge erred in telling the jury that they would "deduct" a reasonable amount for contributory negligence instead of saying that the damages would be "diminished" on account of the contributory negligence.

This, it seems to us, is a distinction without a difference and a jury of twelve men would not know the difference between the two, if there is any beyond a metaphysical distinction. It is true the Act of Congress and the decisions of the Court use the word "diminish," but when one thing is deducted from another the larger amount is diminished to that extent. His Honor went further and charged that the amount deducted must be the equivalent of contributory negligence.

The defendant placed emphasis on its contention that the plaintiff suffered from locomotor ataxia and that this disease could not have been caused by an injury received in the collision. The evidence of the experts conflicted on this question. Under the present system of summoning experts they are selected as witnesses to the fact *are* because it is ascertained beforehand that their testimony will be favorable to the side that summons them. It has long been suggested by leading members of both the legal and medical professions that

the method of summoning expert witnesses, should be radically changed, and that they should be the "witnesses of the law" and not of either party. There is a strong opinion that experts should not be summoned in any case, civil or criminal, except upon
213 an order made by the Judge on motion and notice to the opposite side and upon a finding of the Judge that it is expedient that such experts should be summoned and thereupon the Judge shall fix the number, not exceeding three, and shall select the experts and fix their compensation, with a provision that no other experts shall be examined on the trial and they shall receive no other compensation.

This is a matter, however, for consideration by the General Assembly.

Probably the weight of medical opinion is that this disease is never traumatic, but is always produced by one disease (syphilis). But there are those who assert that it is traumatic, that is produced by an injury and others still who admitting the single cause stated, say that it may be accelerated or intensified by an injury. The jury held with one or the other or possibly both of the latter theories. We have no means of determining which set of experts were correct and the matter was one of fact for decision by the jury.

This cause was very fully and ably discussed before us as it was also, from the record, before the Judge and jury in the trial Court. After a careful consideration of all the exceptions and the arguments thereon, we find no reversible error which would entitle the defendant to a new trial. Nor are there any propositions of law whose more elaborate discussion would be of benefit in other cases of like nature. The trial turns almost necessarily as above stated, upon two issues of fact, i. e., whether and to what extent the negligence of the plaintiff, if any, contributed to the collision and further whether the physical injury of which he complained was caused by said collision or was due to previous disease. The instructions of His Honor upon these two propositions contained nothing which require- elaborate discussion.

If there was any error, it was against the plaintiff in his Honor's intimation that if the negligence of the plaintiff was equal to the negligence of the defendant he could recover nothing whereas in such case the plaintiff would be entitled to the full amount
214 of damages less an allowance of one-half to be deducted on account of his contributory negligence. Or, as the defendant contends, the amount of such damages sustained by the plaintiff, if any, in the wreck should be "diminished" by one half on account of the contributory negligence of the plaintiff, if it equalled the negligence of the defendant. The charge of the court on this point seems to have been partially if not completely cured by the further instruction of the Court. Of this instruction the defendant cannot complain and the plaintiff is not appealing.

No error.

#255.

215 TILGHMAN
v.
RAILROAD COMPANY.

Wake.

WALKER, *J. (dissenting):*

I am of the opinion that there was substantial error in the trial of this case. Several errors are assigned which relate to the cause of action, that is, to the question of defendant's negligence, and they raise the question whether the court did not try the case by the old law or that which obtained before the passage of the Federal Employers' Liability Act by Congress and the corresponding legislation in this State by our General Assembly (Public Laws of 1913, Ch. 6,), under which contributory negligence was a complete defence and bar to a recovery of damages, while under these Acts it goes merely in diminution of the damages. But I will pretermit any discussion of this serious question and pass to the principal exception argued before us, which was taken to these instructions of the court, not set forth fully in the opinion of the Court, and therefore reproduced here: "If you come to the question of damages, you will assess his reasonable damages under the rule which I have laid down, and then you will make an allowance for his own negligence and deduct that from his damages, if you find it was less than his damages. If you find it was equivalent, that would make his damages nothing, but if you find it was less, a reasonable allowance for his own negligence was less than the amount of his own damages, you will deduct it and find the result."

After being out for some time, the jury returned to the court room for further instructions. One of the jurors said: "It seems that one or two of the jurors have understood it one way, and the others another. It seems that part of the jurors say that they understand from your charge that if they were equally negligence, that the plaintiff gets nothing."

The court thereupon gave the following instruction: "I don't think I would put it just that way, but this way: If you find
216 that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you will answer that 'Yes,' and if you find that the plaintiff was guilty of contributory negligence as charged, you will answer that second issue 'Yes,' and then you will assess the damages that you find he is entitled to, and then deduct from that whatever amount you think would be proper for his contributory negligence. I perhaps did say that, if you find that his contributory negligence amounted to as much as the amount of damages it would be nothing, but I did not put it that way—if they were equally negligent that he would be entitled to nothing. It would not be that. But you will deduct a reasonable

amount from the damages that you think that he is entitled to from the damages, as an allowance for contributory negligence. It would be for you to say, whether it is less or whether it is equal, but I did not put it just that way—that if they were equally guilty of negligence—but that you would just deduct from the amount you find he would be entitled to, if he were not guilty of contributory negligence a reasonable amount for contributory negligence. You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to and deduct that from the amount of damages."

Waiving the confusion in the last instruction, which is alleged by the appellant, and the clear error in the first one, I proceed to consider the correctness of the instruction given to the jury at their request, in explanation of the first and erroneous one. The appellant assigns the following specific errors to these instructions, which I think are well taken: (1) They lay down no rule for the guidance of the jury, but leave the matter subject entirely to the exercise of their discretion; (2) they do not conform to the directions of Section 3 of the Federal Employers' Liability Act; and (3) they do not contain the statement that the damages shall be diminished, but merely that the jury would deduct a reasonable amount for contributory negligence.

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The jury answered the issue of negligence "Yes," the issue of contributory negligence "Yes," and the issue of damages "$7,000.00." What they found the total amount of damages to be does not appear and cannot be determined. The answer to the issue, "$7,000.00" may be the remainder after deducting ten thousand dollars or ten cents, just as the jury may have found such amount to be a reasonable deduction for the contributory negligence. Or the jury could very readily have regarded the matter of making any deduction at all as within their discretion and $7,000.00 may be their finding of the total damages sustained by the plaintiff. However that may be, the defendant was entitled to a correct instruction as to the effect of plaintiff's contributory negligence on the damages to which plaintiff would be entitled, and the failure to give a correct instruction would be such error as would entitle defendant to a new trial of all the issues. It would be impossible for another jury to pass upon the issue of damages alone, because it would be necessary to determine the relative negligence of defendant and plaintiff in order to measure the damages. Under the Employers' Liability Act, the issues of negligence and damages would seem to be inseparable, as each bears upon the other. The combined negligence of both parties must be compared with the negligence of each in order to apportion the damages, as the Act requires the jury to do.

It is presumed that the jury would have been controlled by correct instruction, and therefore there can be no presumption that the jury, by forming an estimate of a reasonable amount, arrived at the same or a smaller figure than they would have reached after considering the matter under a charge requiring them to diminish the damages

in proportion to the amount of negligence attributable to the plaintiff.

If the charge of the court in this case is compared with the
218 charge as approved by the United States Supreme Court in N. & W. R. R. v. Earnest, 229 U. S. 114, the error will become apparent. In that case, Mr. Justice Van Devanter says: "The third section of the Employers' Liability Act declares, subject to a proviso not material here, that 'the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee;' and in its charge the court dealt with the subject of contributory negligence as follows: 'Contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress, under which this suit was brought, provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the negligence of the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.'" The learned Justice (Mr. Justice Van Devanter) then proceeds to say, that an exception to the instruction was reserved below, which was based upon the ground that the Employers' Liability Act is unconstitutional, but that it was criticized in the higher court, because it prescribed a wrong rule for the diminution, in that it directed or permitted it to be made upon a comparison of the plaintiff's negligence with that of the defendant and in regard to this objection to it he added: "The thought which the instruction ex-
219 pressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words, 'as compared with the negligence of the defendant,' there would be no reason for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negli-

gence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee," and for this observation he cites the Second Employers' Liability cases, decided formerly by that high and honorable Court (Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1 (56 L. Ed. 346); 38 L. R. A. (N. S.) 44). Another important case, directly in point and which condemns such an instruction as that given below in the trial of this action, is Railway v. Lindsay, 34 Supreme Court Rep. 581, to which the same court thus authoritatively states the true construction of the "Act and the law applicable to the assessment of damages under it. After the preliminary statement that a recovery is not prevented under the Act by the plaintiff's contributory negligence, it proceeds to give the reasons for it in this language: "The statute substitutes for it a system of comparative negligence, whereby the dam-
220 ages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier, in other words, the carrier is to be exonerated to the amount of negligence attributable to the employee," citing N. & W. R. Co. v. Earnest, supra.

So we see that it is imperatively required by the Act that its rule for the admeasurement of damages should be definitely stated to the jury, with proper explanation of its meaning, so they may understand how to apply it. This was not done in the trial below. I attach no importance to the use of the words "deduct" or "deducted," instead of the words "diminish" or "diminished." That would be a mere play upon words, but that is not the error, as stated in the opinion of the Court, but the more serious one, that the rule of the Act was not applied, or even stated at all, and certainly not explained to the jury. Even if the first instruction given by the court on this question had been correct, and it is far from being so, it surely was not explained enough and was clearly erroneous in one particular already shown, the second charge given (after the jury had returned to the court room for an explanation of the first one, and more definite instruction as to the damage) was not, by any means, a compliance with the rule of the statute, as it was left to the jury to deduct a reasonable or proper allowance for plaintiff's negligence, without regard to the rule of proportion of the one party to the combined negligence of both, which is prescribed by the Act of Congress. The jury were also told, in explaining the former error, that "you would first deduct from the amount you find he would be entitled to, if he were not guilty of contributory negligence, a reasonable amount for contributory negligence." Nor was the other branch of the instruction correct, viz: "You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that
221 from the amount of damages." But if any view taken of this question in the case, the instructions, if not contradictory,

were at least erroneous in part, and the jury not being able to distinguish between the right and the wrong instructions, the erroneous one is supposed to have been followed and a new trial would result. This, I believe, is the rule in all courts. Edwards v. Railroad Co., 129 N. C., 78; Tillett v. Railroad Co., 145 N. C., 663; Anderson v. Meadows, 169 N. C., 406. In this kind of case, the new trial must extend to all the issues.

I think my view of the statute and of the incorrectness of the charge of the court thereunder, is fully sustained in Railway Co. v. Hill, 139 Ga. 549; Neil v. Railroad Co., 22 Idaho 74. The question now presented has not been involved in any case heretofore considered by this Court that I am aware of. We are bound by the decision of the highest Federal court as to the meaning and application of the Act and its proper enforcement in actual practice, for it is a federal question.

There are other errors assigned by defendant, as we have said, but it is not necessary that I should discuss them, as the one already considered is sufficient to reverse the judgment and demand a new trial of the case.

Justice Brown concurs in this dissenting opinion.

222 *Judgment.*

Supreme Court of North Carolina, August Term, 1914.

No. 255.

W. B. TILGHMAN
VS.
SEABOARD AIR LINE RAILWAY.

Wake County.

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County:—

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twenty 60/100 dollars ($20.60), and execution issue therefor.

223 *Certificate.*

SUPREME COURT OF NORTH CAROLINA, *ss:*

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the case of W. B. Tilghman vs Seaboard Air Line Railway as the same now appear from the originals on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, N. C., this 1st day of December, 1914.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 24,457. North Carolina Supreme Court. Term No. 713. Seaboard Air Line Railway, plaintiff in error, vs. W. B. Tilghman. Filed December 3d, 1914. File No. 24,457.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,

v.

W. B. TILGHMAN,
Defendant in Error.

No. 713

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

MOTION ON BEHALF OF W. B. TILGHMAN, DEFENDANT IN ERROR, TO DISMISS THE WRIT OF ERROR OR AFFIRM THE OPINION AND JUDGMENT RENDERED BY THE SUPREME COURT OF NORTH CAROLINA; AND, IF THE COURT SHOULD DESIRE TO HEAR ARGUMENT, TO TRANSFER SAID CAUSE TO THE SUMMARY DOCKET.

Comes now the Defendant in Error, W. B. Tilghman, by his counsel, William C. Douglass, Clyde A. Douglass and Robert N. Simms, appearing in his behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction upon the grounds hereinafter set forth in the brief filed herewith.

The Defendant in Error further moves the Court to affirm the opinion and judgment rendered by the Supreme Court of North Carolina, upon the ground that it is manifest that the writ of error was taken for delay only and that the questions on which the decision of the cause depend are so frivolous as not to need further argument. If the Court should

desire to hear argument, then the Defendant in Error further moves the Court to order this cause transferred to the summary docket provided for by this Court in an amendment to Rule 6, as the case is of such a character as not to justify extended argument.

The grounds of these motions, the statement of the case, and the facts and arguments are more fully set forth in the briefs accompanying the motions, all of which is herewith submitted.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
ROBERT N. SIMMS,
Counsel for Defendant in Error.

Notice to Seaboard Air Line Railway.

To Seaboard Air Line Railway, Plaintiff in Error, and Murray Allen, its counsel:

Please take notice, that on Monday, the....day of February, 1915, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Attached hereto are copies of the motions to dismiss and affirm, the briefs and arguments to be submitted in support thereof; and also the motion to transfer this cause to the summary docket, if the Court should desire to hear argument thereon.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
ROBERT N. SIMMS,
Counsel for Defendant in Error.

Service of copies of the above-mentioned motions, notices, and copies of briefs, acknowledged and accepted, this..... day of....., 1915.

....., Plaintiff in Error.
By....., Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1914.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
v.
W. B. TILGHMAN,
Defendant in Error.

No. 713.

DEFENDANT IN ERROR'S BRIEFS ON MOTIONS TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION, AND TO AFFIRM THE JUDGMENT OF THE STATE COURT.

STATEMENT OF THE CASE.

Briefly stated, the Defendant in Error was, at the time of the injury complained of, in the employment of the Plaintiff in Error and engaged as a conductor in the operation of one of Plaintiff in Error's passenger trains engaged in interstate commerce.

The Defendant in Error was injured on the 19th day of November, 1912, in a head-on collision between the train of which he was in charge and another passenger train of the Plaintiff in Error at a point near Granite, North Carolina.

The complaint fully sets forth the Defendant in Error's contentions. The record discloses that during the progress of the trial the Defendant in Error was permitted by the

Court to withdraw his allegations and all evidence in respect to having maintained two stations upon its single line in close proximity, with names so similar in sound and so closely resembling each other in chirography that one might easily be mistaken for the other; Plaintiff in Error's failure to have in operation a flag system on its line of railway and in operating its trains by telephonic communication alone; which left the trial to proceed upon the remaining allegations alleged in the complaint and amendment thereto, to which only a general denial and the defense of contributory negligence were pleaded.

The following issues were submitted to the jury as arising upon the pleadings after the withdrawal of the pleadings above set forth and all evidence relating thereto from the jury, to-wit:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

"2. Did the plaintiff, by his own negligence, contribute to his injury as alleged in the answer?

"3. What amount of damages is the plaintiff entilted to recover of the defendant?"

The jury answered the first issue "Yes," the second issue "Yes," and the third issue, "Seven Thousand Dollars."

The defendant in the trial Court noted numerous exceptions but on appeal abandoned a number of them as will appear from the opinion and judgment of the Supreme Court of North Carolina.

As we view the case, all of these assignments of error referred to are non-federal except possibly numbers (90, 92, 93, 96, 97 and 98 as enumerated in the printed record of the Supreme Court of North Carolina) 26, 27, 28, 29, 30 and 31 in the writ of error, pages 78, 79, 80... of the record, and to these last mentioned, alone, we advert in our argument on the motion to dismiss for want of jurisdiction.

BRIEF ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

That part of His Honor's charge to the jury in the trial Court, and which is the subject of exceptions numbers 90, 92, 93, 96, 97 and 98 as enumerated in the record of the Supreme Court of North Carolina and in the writ of error as assignments of error numbers 26, 27, 28, 29, 30 and 31, pages 78, 79, 80 of the record, is as follows:

> "26. 'Upon the third issue, what damages is the plaintiff entitled to recover, the rule is this: He would be entitled to recover, if entitled at all, for past and prospective loss resulting from the wrongful act of the defendant, including indemnity for actual expense, if there is any evidence of actual expense, incurred for medical attention, loss of time from inability to perform mental or physical labor, if there is any evidence bearing upon the inability to perform mental or physical labor, and incapacity to earn money and for actual suffering of body and mind when they are the immediate and necessary consequences of the negligent injury.'
>
> "27. 'And now another question comes in here, which is interesting because it is of recent application in our laws. I have sometimes said, if the gentlemen will pardon me for saying so, that the jury have for many years been unconsciously applying it, but under this act under which this action is brought you are permitted to apply it if you find that he was guilty of contributory negligence. Ordinarily, when the jury have found that the defendant was guilty of contributory negligence, I mean where the defendant is guilty of negligence and that the plaintiff was guilty of negligence, where they answer both issues "Yes," then they give no damages, but under this act you are permitted to do it.'

"28. 'If you answer the second issue 'Yes,' that is, if he was guilty of contributory negligence, and so if you should answer the two issues 'Yes,' and come to the question of damages, you would assess his reasonable damages under the rule which I have laid down, and then you would make an allowance for his own negligence, and deduct that from his damages, if you find it was less than his damages. If you find it was equivalent, that would make his damages nothing, but if you found it was less, a reasonable allowance for his own negligence was less than the amount of his own damages, you would deduct it and find the result.'

"29. 'I don't think I would put it that way, but this way: If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you would answer that 'Yes,' and if you find that the plaintiff was guilty of contributory negligence as charged, you will answer that second issue 'Yes,' and then you would assess the damages that he would be entitled to, and then deduct from that whatever amount you think would be proper for the contributory negligence.'

"30. 'I perhaps did say that if you found that his contributory negligence amounted to as much as the amount of damages, that it would be nothing, but I did not put it that way—that if they were equally negligent that he would be entitled to nothing. It would not be that.'

"31. 'But you would deduct a reasonable amount from the damages that you think that he would be entitled to from the damages as an allowance for contributory negligence. It would be for you to say whether it is less or whether it is equal, but I did not put it just that way—that if they were equally guilty of negligence—but that you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence

a reasonable amount for contributory negligence. You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages."

. These exceptions relate to the matter of diminishing the damages because of the Defendant in Error's contributory negligence. They and all of their context should be construed together. When so read and construed, it will appear that the charge as therein contained was more favorable to the Plaintiff in Error than it was entitled to. The rule prescribed by the judge was, we submit, harder on the Defendant in Eror than the statute contemplates, for his Honor seems to have charged that the quantum of the Defendant in Error's negligence should be compared with the quantum only of the Plaintiff in Error's negligence, and manifestly the proportion which the Defendant in Error's negligence bore to the Plaintiff in Error's negligence was a larger fraction than the fraction which would have been the result of comparing the Defendant in Error's negligence with the sum total of all of the negligence of both Defendant in Error and the Plaintiff in Error. So, following this charge, the jury would have deducted from the total amount of damages a larger fraction than was proper, which would have been in the Plaintiff in Error's favor and to the Defendant in Error's hurt. The very case cited in Plaintiff in Error's brief indicates that the sum total of all of the negligence of both the Defendant in Error and the Plaintiff in Error should be the denominator of the fraction, of which the Defendant in Error's negligence should be the numerator in ascertaining the proportion by which the total damages should be diminished on account of the Defendant in Error's negligence.

But aside from this consideration, the judge's language was closely parallel to the language of the statute. He sub-

stantially charges that the jury should deduct a "reasonable allowance" for the plaintiff's (now Defendant in Error) own negligence, and that this reasonable allowance should be "equivalent to the plaintiff's (now Defendant in Error) negligence." We submit that the charge as given cannot be complained of by the Plaintiff in Error. If there was error at all the error was favorable to the Plaintiff in Error, for the Defendant in Error's negligence when compared with the Plaintiff in Error's would have made a larger fraction to be deducted than the fraction made by comparing the Defendant in Error's negligence with the combined negligence of the Defendant in Error and the Plaintiff in Error.

As we understand this case, the Court will not take jurisdiction herein unless the Plaintiff in Error has been denied some title, right, privilege or immunity under the Federal Employers' Liability Act. It was not denied any title, right, privilege or immunity; but, on the other hand, it received under the charge to the jury in the trial Court a more favorable construction of the Federal Employers' Liability Act in the particulars mentioned than it was entitled to. If we should concede for the purpose of argument that the charge given by the trial Judge in the Court below is not in the language of the Act, and that approved in *N. and W. R. R. v. Ernest,* 229 U. S., 114, yet in that case the Court intimates that the error, if such it might be called, not being hurtful to the Plaintiff in Error, would not be reversed on this account.

"If the charge of the Court was more favorable to the Plaintiff in Error than was authorized by the statute, 'then the Plaintiff in Error was denied no title, right, privilege or immunity under the statute, and the writ of error should be dismissed.'"

Grand Trunk Ry. Co. v. Lindsey, 233 U. S.; 58 L. E., p. 838.

We therefore contend that the Plaintiff in Error was denied no title, right, privilege or immunity under the Act of Congress in question, and the writ of error should be dismissed for want of jurisdiction.

We further contend that, upon an examination of the entire record, it is manifest that the writ of error was taken for delay only, and that the question upon which the jurisdiction depends is so frivolous as not to need further argument, and the defendant therefore moves the Court to affirm the opinion and judgment of the Supreme Court of North Carolina.

If, however, the Court desires to hear argument in this case, the Defendant in Error prays that it may be placed on the summary docket, provided for by this Court in an amendment to Rule 6, as the case is of such a character as not to justify extended argument.

Respectfully submitted,

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
ROBERT N. SIMMS,
Counsel for Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.
v.
W. B. TILGHMAN,
Defendant in Error.
No. 713.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTIONS TO DISMISS THE WRIT OF ERROR.

STATUS OF THE CASE.

This case is before the Court on writ of error to the Supreme Court of North Carolina to review the judgment of that Court affirming a judgment rendered in the Superior Court of Wake County against the plaintiff in error. The action was brought and tried under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Ch. 149, U. S. Comp. Stat. Sup. 1911, p. 1322) to recover damages for personal injuries alleged to have been received by a conductor while employed by the defendant in interstate commerce. The jury found the defendant guilty of negligence, plaintiff guilty of contributory negligence, and assessed the damages at $7,000. Defendant appealed to the Supreme Court of

North Carolina, and the judgment of the Superior Court was affirmed at Fall Term, 1914, in an opinion rendered by Chief Justice Clark, from which Justices Walker and Brown dissented. The opinion of the Court and the dissenting opinion of Justice Walker will be found at pages ____ of the printed record.

Upon petition of the defendant, Chief Justice Clark allowed the writ of error which brings the case before this Court.

Defendant in error now moves to dismiss the writ of error or affirm the opinion and judgment rendered by the Supreme Court of North Carolina; and, if the Court should desire to hear argument, to transfer the case to the summary docket. The question of jurisdiction has been foreclosed by numerous decisions of this Court, and a casual examination of the exceptions relied upon by the plaintiff in error will show that there is no merit in the motion to dismiss. The motion to affirm the judgment of the Supreme Court of North Carolina is, we think, equally without merit. If our positions on the questions of the construction and application of the Federal Employers' Liability Act are correct, the plaintiff in error has been grievously prejudiced by the judgment in this case, and has been denied important rights and privileges accorded it by that act. This is not only true as regards the instructions on the issue of damages and the relation of contributory negligence to the amount to be awarded, quoted in the brief of defendant in error, but it relates to instructions on the issue of negligence given and refused, to evidence erroneously admitted, and to other exceptions noted and assigned as error by the plaintiff in error.

The statement in brief of defendant in error that numerous exceptions were abandoned in the Supreme Court of North Carolina does not relate to any of the exceptions discussed herein, but refers merely to a number of minor exceptions relating to matters which passed from the case when plaintiff eliminated several of the grounds of negligence by amending

his complaint and by the withdrawal of evidence relating thereto.

In the following statement of the case and argument we refer to the defendant in error as plaintiff and to plaintiff in error as defendant for convenience in expression.

STATEMENT OF THE CASE.

Plaintiff brought this action to recover damages for personal injuries sustained in a collision on defendant's railroad near Granite, N. C., November 19, 1912. At the time of the collision plaintiff was employed as conductor on defendant's passenger train No. 84, running from Columbia, S. C., to Richmond, Va., and this train collided with southbound train No. 81, running from Richmond, Va., to Columbia, S. C., and to points south of Columbia.

At Norlina, N. C., on the trip north, the train in charge of plaintiff as conductor, No. 84, stopped, and plaintiff received an order fixing a meeting point with southbound train No. 81, and alleged negligence in connection with this order is the basis of plaintiff's claim for damages.

In the complaint, as originally filed, plaintiff alleged that his injury was due to the negligence of the defendant in ordering train No. 81 to meet train No. 84 at *Granite, N. C.*, and train No. 84 to meet train No. 81 at *Grandy, Va.* By an amendment of the complaint, made at the conclusion of the evidence, plaintiff alleged that the defendant was negligent in that it delivered to plaintiff at Norlina, N. C., a train order for the meeting of his train, No. 84, with train No. 81, "written in such form and manner that if the same was intended to refer to any other meeting place than 'Grandy,' nevertheless, the same was so negligently written that the word appeared to be 'Grandy;' and in that when the plaintiff read his said train order to the defendant before leaving Norlina, as he did so read it aloud in a plainly audible and distinct tone of voice, 'Grandy,' the defendant negligently assented to and approved the said reading and pronunciation of

the said 'Grandy;' and in that thereafter and before the plaintiff's train reached the station, Granite, N. C., the defendant negligently twice read the said train order to the plaintiff and each time read and pronounced the same in respect to the meeting place therein designated, 'Grandy.' " (Printed record, page ---.)

The case was tried by plaintiff's counsel principally upon the theory of negligence contained in the original complaint, that is, that conflicting orders were given the two trains. Upon the trial, defendant offered in evidence copy of the order which was found on the body of Engineer Beckham of train No. 84, which was a carbon copy of the order given plaintiff, Tilghman, at Norlina. (See Exhibit A, which is the original order, and Exhibit B, which is the office copy of the same order.) At the conclusion of all the evidence, plaintiff, over defendant's objection, amended his complaint as above set forth, to cover the theory that the order given him was written in such manner that the name of the station at which his train was to meet train No. 84, appeared to be Grandy and not Granite.

The defendant denied that the collision was in any manner due to its negligence, and pleaded contributory negligence and assumption of risk as defenses. The fact of the collision was not denied, but it was contended by the defendant that the sole cause of the collision was the negligence of the plaintiff himself in failing to properly read the order given him, and in failing to stop at Granite, N. C. It appeared in evidence that plaintiff's train had passed the station at Granite and was proceeding north to Grandy when the collision occurred. (Printed record, page ---.)

The plaintiff, W. B. Tilghman, testified that when he arrived at Norlina, N. C., on the run from Columbia, S. C., to Richmond, Va., on the morning of this collision, the operator at Norlina, by the name of Watson, gave him an order to meet train No. 81 at Grandy; that Grandy is about thirty or thirty-one miles from Norlina, and Granite is a little over seven

miles from Norlina; that Granite is between Norlina and Grandy; that when he got this order to meet train No. 81, he read it to the operator, as follows: "Order No. 9 is annulled. Train 84, Engine 91, will meet train 81, Engine 93, at Grandy;" that he used the word "Grandy" distinctly, and the operator didn't say anything; that he had two copies of the order and delivered one to Engineer Beckham, who read the order to him and read the station "Grandy;" that when the train passed Granite it was running between fifty and sixty miles an hour. (Printed record, page ___.)

In considering the defendant's position, it may be taken as established that the order which was removed from the body of Engineer Beckham was an exact duplicate of the order delivered by Operator Watson to the plaintiff. This is true, because defendant requested instructions based upon that theory which the trial court refused to give. Under the rules of the defendant, the conductor is charged with the safety of his train. Plaintiff admitted this and in connection with his duty and the means available for its performance, he testified as follows: "I was in charge of train No. 84 that night, as conductor. The conductor has a means of communicating with the engineer on his train, by signal cord, placed at different places in different cars, not always in the same position. It is a whistle cord. In my train the whistle cord was in top of the car, down the center aisle where the conductor can reach up and signal the engineer. There is a means by which I can apply the emergency brake on each car that will stop the train. If the engineer of my train were doing anything contrary to orders that was liable to affect the safety of my train, I could stop him. In approaching a meeting point, the engineer gives a signal, the station blow, and the conductor acknowledges it, with one long blast of the whistle, to remind him of the meeting point, and he answers two short. But if the engineer did not answer, or if I thought that he overlooked it, I have means of stopping the train. And it would be my duty as conductor to stop the train. I was supposed to be

looked upon as being responsible for the train. The conductor had charge of the train. I was in charge of the train and could control the engineer when it was necessary. I could make him stop anywhere and stay there. I had authority to make him do anything I thought necessary for the safety of the train.". (Printed record, page ___.)

The defendant contended that the doubt of the plaintiff as to the meeting point of his train with train 84 made it imperative for him to ascertain definitely such meeting point before leaving Norlina, and if such a doubt arose after leaving Norlina, it was his duty to stop at Granite to ascertain the correct meeting point.

The rules of the defendant, with which the plaintiff was entirely familiar, provided that in all cases of doubt or uncertainty, the conductor should take the safe course and run no risk. (Printed record, page ___.) If this course had been pursued, and this rule observed by the plaintiff, this collision would have been averted, and the plaintiff would not have sustained the injuries as alleged in his complaint. His own testimony establishes beyond question that if he had stopped at Granite, even for a few seconds, the collision would not have occurred. He says: "From Granite to the point of this collision, I suppose, was a quarter of a mile or over. It would have been only a very short while before 81 would have come into Granite; just a few seconds. *If I had stopped at Granite, I would have been there only a few seconds before 81 arrived. If I had stopped there on the main line 81 would have come in in a few seconds and would have taken the siding.* Mine was the superior train. I had the right of track and was on the main line. I would have kept the main line and 81 would have taken the siding. My train would have stayed on the main line. If I had stopped at the station at Granite I would have stayed right on the main line, and in a few seconds 81 would have come in sight." (Printed record, page _____.)

The plaintiff was fully cognizant of his duty, in the event

the order received by him was of a doubtful character, and he testified, to meet this position, that he had no doubt about the meeting point being Grandy. He would not admit that he was in doubt, because the force of such an admission was apparent, and he knew that under the rules of the defendant it was his duty, if there existed in his mind any doubt as to the proper meeting point, to stop at Granite in order to protect the train in his charge. On cross examination, he testified: *"It is the duty of the conductor in case of doubt to pursue the safe course. That is the requirement of the standard rules in effect upon all the railroads, not only applying to conductors, but all classes of railroad employees. This was the rule on the Seaboard at that time and now.* If a conductor was in doubt as to the meeting point fixed by a train order it would be his duty not to accept it. If he discovered it after he had accepted it, it would be his duty to stop immediately and make some effort to get the correct information concerning the order from the train dispatcher who gave it, if he detected that there was anything wrong with it after he accepted it. *If a conductor should have any question as to it between two points, as to which was the meeting point, and he reached one of those points, it would be his duty to ascertain from the proper officer of the company at which one of these points they were to meet. If there was a doubt and he reached one of the points, it would be his duty to stop there."* (Printetd record, page ----.)

We submit that an examination of plaintiff's own evidence and the evidenec of his witness, Bryant, will show that he was in serious doubt as to whether the order provided that the two trains should meet at Granite or Grandy. The witness, Bryant, who testified in behalf of the plaintiff, said: "Captain Tilghman came in the baggage car, as he usually does, and read his orders over to me. He read, No. 84 will meet No. 81 at Grandy, and as a rule I always repeated the meeting point back to him, so as to understand. I said meet 81 at Grandy, and then he made a remark, laid the order

down, and made a remark that he did not like the idea of having two stations on the same district with names so near alike, it was liable to cause a misunderstanding. Then he held his order up to the light in the top of the car, in this manner (illustrating) and read it over the second time, 'No. 81 at Grandy.' Then he came around some baggage from the door to where I was standing in the side of the car, where there was a mail rack and pigeon hole boxes where I was assorting my local mail, had my hands full of mail, with the order in his hand and says to me, 'This looks like Grandy to me, what does it look like to you?' I looked at the bottom of the order and said, 'It looks like Grandy to me.' (Counsel holds up framed copy of the order.) This order in this condition is more deeply outlined, heap more plainer. The copy I saw was very dull. The one I saw looked like Grandy." (Printed record, page .....)

If the order offered in evidence by the defendant is a duplicate of the order on which plaintiff was operating his train, upon the plaintiff's contention that he was given a doubtful order, its doubtful character appears upon its face, and it is either Granite or it is so written that it might be read Granite or Grandy, and it is sufficient in itself to support the instructions requested by the defendant, based upon the failure of the plaintiff to pursue the safe course as required by the defendant's rules. Upon this copy being exhibited to the plaintiff, he said that he did not see how you could make anything out of the name of the station appearing thereon. (Printed record, page .....) This establishes the fact that if the plaintiff had been operating his train upon that order, he would have deemed it his duty in the observance of the defendant's rules to stop at Granite and not to proceed further until he had ascertained definitely the meeting point for his train and train No. 81.

The defendant showed by John D. Lanier, employed as train dispatcher at Richmond, Va., that he transmitted

the order over the telephone to operator Watson at Norlina and operator Perkinson at La Crosse, Va. Lanier testified that the order was transmitted to Watson on the telephone and while being transmitted it was copied by Watson. He then repeated it to the dispatcher; that when Watson reached the name of the station, he spelled it out distinctly G-r-a-n-i-t-e; that it was pronounced and then spelled; that after the order was transmitted to Watson, he asked him if he had it Granite and Watson said, "Yes, Granite." (Printed record, page .....)

J. L. Watson, defendant's operator at Norlina, N. C., testified that he received this order over the telephone from the dispatcher on the morning of the collision; that the copy, Exhibit B, is the copy of the order which was retained by him in his office, and that the copy, Exhibit A, is an exact duplicate of the order which he gave conductor Tilghman. He testified that the order was made in triplicate by the use of carbons; that he wrote it down as he received it over the telephone; that after he received this order, he spelled the name of the station over the telephone to the dispatcher at Richmond, G-r-a-n-i-t-te, and that he again spelled it over the telephone, after it was made complete by the signature of the conductor. He testified further that conductor Tilghman read the order over to him, and read the meeting point as Granite. (Printed record, page .....)

L. W. Perkinson testified that he was operator for the defendant at La Crosse, Va.; that he was on the telephone line with the operator at Norlina, N. C., and dispatcher at Richmond, Va., and heard the order given for train 81 to meet train 84 at Granite, and that he heard the operator at Norlina spell the meeting place, G-r-a-n-i-t-e; that the same order was intended for him, to be given by him to conductor of southbound train 81; that he copied it at the time and gave a copy to Shannonhouse, conductor on train 81. The copy of the order delivered to conductor Shannonhouse appears in

the record as Exhibit D, and shows the meeting point to be Granite. (Printed record, page .....)

The defendant showed by the testimony of W. B. Carlyle, Walter Moore, J. R. Bissett, H. W. Stanley and W. L. Stanley, that the copy of order offered in evidence as Exhibit A, was found on the body of engineer Beckham after the collision. (Printed record, page .....)

C. E. Matthews, one of defendant's conductors, who has been in the railroad service for fifteen years, testified that if a conductor has doubt about the meeting point fixed by his train order, it is his duty to stop at the first station and have it corrected or straightened out and to satisfy himself that he was right; that when he reached one of the stations about which he was in doubt, it would be his duty to stop. (Printed record, page .....)

W. P. Clements, a conductor of twenty-five years' experience, testified: "It is the duty of a conductor in case of doubt to take the safe side and run no risk. If a conductor should get an order fixing a meeting place and he was in doubt about the meeting point, it would be his duty to stop immediately. *If the conductor should reach one of the points that created the doubt, it would be his duty to stop there and find out.*" (Printed record, page .....)

L. W. Renn, one of defendant's conductors, testified that it was necessary for him to know the meeting point of trains 84 and 81 in handling his train at Norlina, and that on the morning of this collision, and before the collision occurred, he read the order addressed to conductor of train 84, and read the meeting point "Granite" and told his engineer that the meeting point was Granite, and this information was used in operating his train at Norlina. (Printed record, page ___.) This was corroborated by Engineer Tudor. (Printed record, page ___.)

Issues were submitted to the jury and answered as follows:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint and the amendment thereto?

A. "Yes."

2. Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

A. "Yes."

3. What damages is the plaintiff entitled to recover?

A. "$7,000."

(Printed record, page .....)

The verdict of the jury demonstrates conclusively that the first issue was answered "Yes" upon the theory that the defendant was negligent in giving plaintiff a train order so written that the meeting point with train No. 81 was not clear. This is true because if the jury had found that plaintiff was given an order for train No. 84, which was in his charge, to meet train No. 81 at Grandy, and the conductor of train No. 81 was given an order to meet train No. 84 at Granite, there is no possible theory upon which plaintiff could be charged with contributory negligence. Upon that state of facts, he would not have been guilty of negligence, but would have been conforming strictly to the rules of the defendant in proceeding to Grandy, expecting to meet train No. 81 at that point, and the collision would have resulted entirely from the defendant's negligence. The exclusive cause of the collision would have been defendant's negligence in so directing the movement of its trains as to bring about a collision.

The jury found the plaintiff guilty of contributory negligence—a result which negatives the theory that the trains were given conflicting orders and establishes that the jury proceeded upon the theory that plaintiff was given an order, a duplicate of Exhibit A, and that the meeting point was made doubtful by the manner in which the name of the station was

written. The fact that the jury answered the issues in this way emphasizes the importance of correct instructions on the effect of plaintiff's failure to observe the defendant's rule in the event he received a doubtful order, because presumably the jury would have followed such instructions and would have answered the issues as directed by such instructions. This would have resulted in a verdict for defendant.

The jury's finding that plaintiff was guilty of contributory negligence can mean but one thing in this case, and that is, that with the lives of the passengers and the property of the defendant of enormous value in his charge, he accepted an order which he says was so badly written that you cannot make anything out of the meeting point; he proceeded on that order upon the assumption that it was Grandy; he seriously doubted whether Granite was not the proper meeting point; and, yet, he passed Granite with his train running at the speed of fifty miles an hour. If he had observed the simple requirement of the defendant's rule and in case of doubt pursued the safe course, he would have stopped at Granite, and the collision and resulting loss of life and property would have been averted.

ARGUMENT.

The motion to dismiss, or affirm the judgment of the Supreme Court of North Carolina, is based upon the contention that plaintiff in error has been denied no title, right, privilege or immunity under the Federal Employers' Liability Act. The rights, privileges and immunities relied upon in this case are similar to those appearing in the case of *Seaboard Air Line Railway v. James T. Horton,* 233 U. S., 492, in which a motion similar to that now before the Court was made and disposed of by Mr. Justice Pitney, in the following language:

> "There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege,

or immunity under the Employers' Liability Act was especially set up or claimed in the State court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act, which, if acceded to, would presumably have produced a verdict in its favor, and consequent immunity from the action, this motion must be denied, upon the authority of *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S., 265."

In the present case we asserted a construction of the Federal Act, which if acceded to, would presumably have produced a verdict in favor of the plaintiff in error by requesting the trial Court to instruct the jury as follows:

"Upon the plaintiff's own evidence the Court instructs you that if you find he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was such a doubtful character that it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was, and if he had done so, the collision would have been prevented, then his failure to stop at Granite was negligence on his part, and if you find that it was the sole proximate cause of the injury, you will answer the issue of negligence 'No.'" (Printed record, page --, assignment of error No. --.)

"If you find from the evidence that the plaintiff was given an order by the defendant's operator for train No. 84 to meet train No. 81 at Granite, you will answer the issue of negligence 'No.'" (Printed record, page --, assignment of error No. --.)

"If you find from the evidence that this collision was caused by the failure of the plaintiff to observe the rules of the defendant company, you will answer the issues of negligence 'No.'" (Printed record, page --, assignment of error No. --.)

"If you find from the evidence that the plaintiff was in doubt as to the meeting point of train No. 84 with train No. 81, and you should further find that defend-

ant's rules required him in case of doubt to pursue the safe course, and you should find that the safe course would have been to have stopped his train at Granite, and that by stopping his train at Granite the collision would have been prevented, and the plaintiff would not have been injured, you will answer the issue of negligence 'No.'" (Printed record, page --, assignment of error No. --.)

"If you find from the evidence that the rules of the defendant required the plaintiff in case of doubt or uncertainty to take the safe course, and that the safe course would have been to have stopped train No. 84 at Granite, and that by stopping train No. 84 at Granite, the collision would have been prevented, you will answer the issue of negligence 'No.'" (Printed record, page --, assignment of error No. --.)

"It was the duty of the plaintiff under the rules of the defendant, in case of doubt or uncertainty as to the meeting point of train No. 84 with train No. 81, to have stopped his train at Granite, and if you find that he was in doubt or uncertainty as to such meeting point, and his failure to stop at Granite was the proximate cause of his injury, you will answer the issue of negligence 'No.'" (Printed record, page --, assignment of error No. --.)

The trial Court refused to give these requests for instruction and upon appeal such refusal was affirmed by the Supreme Court of North Carolina. The question of the correctness of these instructions clearly involves the right of plaintiff in error to be shielded from responsibility under the Federal Act, because when properly applied to the facts as presented by the plaintiff in error, no liability on its part would result from the statute.

St. Louis, I. M. & S. Ry. Co. v. McWhorter, 229 U. S., 265.

St. Louis, I. M. & S. Ry. Co. v. Hesterly, Admr., 228 U. S., 702.

We further asserted a construction of Section 3 of the Federal Employers' Liability Act by exception to instructions of the trial court on the issues of contributory negligence and damages, which, if acceded to, would presumably have resulted in a verdict for a smaller amount, and we submit that, by the instructions given, the plaintiff in error was clearly denied the right, privilege and immunity of having its liability determined solely by the provisions of the Federal Act as properly construed.

The trial Court instructed the jury as follows:

> "And now another question comes in here, which is interesting because it is of recent application in our law. I have sometimes said, if the gentlemen will pardon me for saying so, that they have for many years been unconsciously applying it, but under this act under which this action is brought, you are permitted to apply it if you find that he was guilty of contributory negligence. Ordinarily, where the jury have found that the defendant was guilty of contributory negligence—I mean where the defendant is guilty of negligence, and that the plaintiff was guilty of negligence, where they answer both issues 'Yes,' then they give no damages, but under this act you are permitted to do it." (Printed record, page --, assignment of error No. --.)

> "If you answer the second issue 'Yes,' that is, if he was guilty of contributory negligence, and so if you should answer the two issues 'Yes' and come to the question of damages, you would assess his reasonable damages under the rule which I have laid down, and then you would make an allowance for his own neligence, and deduct that from his damages, if you find it was less than his damages. If you find it was equivalent, that would make his damages nothing, but if you found it was less, a reasonable allowance for his own negligence was less than the amount of his own damages, you would deduct it and find the result." (Printed record, page --, assignment of error No. --.)

"I don't think I would put it just that way, but this way: If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you would answer that 'Yes,' and if you find that the plaintiff was guilty of contributory negligence, as charged, you will answer the second issue 'Yes,' and then you would assess the damages that he would be entitled to, and then deduct from that whatever amount you think would be proper for the contributory negligence." (Printed record, page --, assignment of error No. --.)

"I perhaps did say that if you found that his contributory negligence amounted to as much as the amount of damages, that it would be nothing, but I did not put it that way—if they were equally negligent that he would be entitled to nothing. It would not be that." (Printed record, page --, assignment of error No. --.)

"But you would deduct a reasonable amount from the damages that you think that he would be entitled to from the damages as an allowance for contributory negligence. It would be for you to say whether it is less or whether it is equal. But I did not put it just that way —that if they were equally guilty of negligence—but that you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence a reasonable amount for contributory negligence. You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages." (Printed record, page --, assignment of error No. --.)

In *St. Louis, I. M. & S. Ry. Co. v. Taylor,* 210 U. S., 281, 292, the basis of the jurisdiction of this Court over the State courts is stated as follows:

"The judicial power of the United States extends 'to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority.' Article

III, section 2, Constitution. The case at bar, where the right of action was based solely upon an act of Congress, assuredly was a case 'arising under . . . the laws of the United States.' It was settled once for all time in *Cohens v. Virginia,* 6 Wheat., 264, that the appellate jurisdiction authorized by the Constitution to be exercised by this Court, warrants it in reviewing the judgments of State courts so far as they pass upon a law of the United States. It was said in that case (p. 416): 'They (the words of the Constitution) give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided;' and it was further said (p. 379): 'A case in law or equity consists of the right of one party, as well as of the other, and may be truly said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.' But the appellate jurisdiction of this Court must be exercised 'with such exceptions and under such regulations as the Congress shall make.' Article III, Section 4, Constitution. Congress has regulated and limited the appellate jurisdiction of this court over the State courts by section 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock v. Memphis,* 20 Wall., 590, 620. The words of that section material here are those authorizing this court to re-examine the judgments of the State courts 'where any title, right, privilege, or immunity is claimed under . . . any statute of . . . the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such . . . statute.' There can be no doubt that the claim made here was specifically set up, claimed, and denied in the State courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick v. Market Bank,*

165 U. S., 538; *California Bank v. Kennedy,* 167 U. S., 362; *San Jose Land and Water Co. v. San Jose Ranch Co.,* 189 U. S., 177; *Nutt v. Knut,* 200 U. S., 12; *Rector v. City Deposit Bank,* 200 U. S., 405; *Illinois Central Railroad v. McKendree,* 203 U. S., 514; *Eau Claire National Bank v. Jackman,* 204 U. S., 522; *Hammond v. Whittredge,* 204 U. S., 538. The principles to be derived from the cases are these: Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured so that they shall have the same meaning and effect in all the States of the Union."

The question of jurisdiction in the present case, it seems to us, is foreclosed by *Seaboard Air Line Railway v. Duvall,* 225 U. S., 483, in which the late Justice Lurton says:

> "This action was brought under an act of Congress. If the act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled was denied, a right has been denied under the statute, and the question may be reviewed by this court."

In the following cases the jurisdiction has been made to rest upon the contention of the plaintiff in error that there

was a denial of a proper construction and application of the Federal Employers' Liability Act:

St. Louis S. F. & T. R. Co. v. Seale, 229 U. S., 156;
St. Louis I. M. & S. Ry. Co. v. Hesterly, 228 U. S., 702;
North Carolina R. Co. v. Zachary, 232 U. S., 248;
Grand Trunk W. R. Co. v. Lindsay, 233 U. S., 42;
Pederson v. D. L. & W. R. Co., 229 U. S., 146;
Bridget McGovern v. Philadelphia & R. Ry. Co., 35 S. C., Rep., 127.

In *Gulf, etc., Ry. Co. v. McGinnis,* 228 U. S., 173, which was tried under the Federal Employers' Liability Act, the Federal question upon which the judgment of the Court of Civil Appeals of Texas was reversed, related to an instruction of the trial court upon the issue of damages. The jurisdiction of the Supreme Court to review the case was not questioned either by counsel or by the court.

In the cases of *Michigan Central R. Co. v. Vreeland,* 227 U. S., 59, in error to the Circuit Court of the United States for the Northern District of Ohio, and *American R. C. v. Didricksen,* 227 U. S., 224, in error to the District Court of the United States for Porto Rico, assignments of error involving the question of the measure of damages under the Federal Act were considered, and in each case there was a reversal for erroneous instructions on the measure of damages.

See also *Taylor v. Taylor,* 232 U. S., 363, in error to the Supreme Court of State of New York, in and for Orange County, in that State, to review a judgment directing the distribution of the proceeds of a judgment recovered under the Federal Employers' Liability Act.

In *St. Louis Iron Mountain & Southern Ry. v. McWhirter,* 229 U. S., 265, it is held that:

> "A decision of the highest court of a State, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service, act of March 4, 1905 (34 Stat. at L., 1416, Chap. 2939, U. S. Comp. Stat. Supp., 1911, p. 1321), and the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp., 1911, p. 1322), and in which, at the close of the evidence, defendant has requested the Court to instruct the jury to find in its favor, necessarily involves an adverse determination of a Federal question, i. e., defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the State Court."

In the above case, Chief Justice White says:

> "While it is true, as we have said, that coming from a State court, the power to review is controlled by Rev. Stat., Sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

In the McWhirter case the Court considered alleged errors concerning the following subjects: First, the refusal to give the binding instructions asked by the defendant; and, second, an instruction given over the objection and exception of the defendant concerning the act of Congress commonly known as the hours of service act, and in connection therewith a special charge on the same subject given by the court of its own motion, which was excepted to by both parties. (229 U. S., at p. 277.)

The similarity of the questions involved in that case and in our case is sufficient to establish the jurisdiction of this court.

INSTRUCTIONS ON THE RELATION OF CONTRIBUTORY NEGLIGENCE TO THE MEASURE OF DAMAGES.

We submit that the mere reading of the language of section 3 of the Federal Employers' Liability Act and the language of the trial court in charging the jury will demonstrate the error of which we complain, and will establish not only the jurisdiction of this Court, but the right of plaintiff in error to a reversal of the judgment of the Supreme Court of North Carolina.

THE STATUTE.

"The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

THE CHARGE.

"You would assess his reasonable damages under the rule which I have laid down and then **you would make an allowance for his own negligence and deduct that from his damages**, if you find it was less than his damages. If you find it was equivalent, that would make his damages nothing, but if you found it was less—**a reasonable allowance for his own negligence was less than his own damages, you would deduct it and find the result**." (Printed record, page .....)

"If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you would answer that 'Yes,' and if you find that the plaintiff was guilty of contributory negligence as charged, you will answer that second issue 'Yes,'" and then you would assess the damages that he would be entitled to, **and then deduct from that whatever amount you think would be proper for the contributory negligence**." (Printed record, page .....)

"You would deduct a reasonable amount from the damages that you think that he would be entitled to from the damages as an allowance for contributory negligence. It would be for you to say whether it is less or whether it is equal, but I did not put it just that way—that if they were equally guilty of negligence—but that **you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence a reasonable amount for contributory negligence.** You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, **you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages."** (Printed record, page .....)

If these instructions are compared with the charge as approved in *Norfolk & Western R. Co. v. Earnest,* 229 U. S., 114, the error will become apparent. In that case Mr. Justice Vandevanter says:

> "The third section of the Employers' Liability Act declares, subject to a proviso not material here, that 'the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee;' and in its charge the Court dealt with the subject of contributory negligence as follows:
>
> 'Contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your

deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of dimunition of damages in proportion to his negligence, as compared with the negligence of the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.'

An exception to this instruction was reserved, without suggesting any other objection to it than that the Employers' Liability Act was deemed unconstitutional. It is now criticized (a) because, instead of saying that, if the plaintiff was guilty of contributory negligence, the jury 'must diminish the damages,' it merely said that such negligence 'goes by way of diminution of damages,' and (b) because it prescribed a wrong rule for the diminution in that it directed or permitted it to be made upon a comparison of the plaintiff's negligence with that of the defendant. Both criticisms were advanced in the circuit court in support of a motion for a new trial, which was overruled, the Court stating that neither criticism had been suggested before.

We think there is no merit whatever in the first criticism. In one sentence the instruction plainly stated that the statute requires, where the plaintiff has been guilty of contributory negligence, that 'the damages shall be diminished by the jury;' and the statement in the next sentence that such negligence 'goes by way of diminution of damages' was evidently intended as a mere repetition of the statutory requirement in somewhat different words. Its purpose was to give effect to what went before, not to qualify it, and it is not reasonable to believe that the jury could have thought otherwise.

The other criticism deserves more discussion. The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words 'as compared with the negligence of the defendant,' there would be no room for criticism. Those words were not happily chosen, for to have reflected

> what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee,' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S., 1, 50."

Thornton, Employers' Liability Act (2nd Ed.), page 40, says:

> "Under the Federal Statute it becomes the duty of the Court if it is trying the case, or the jury if that is the method of trial, according to the Illinois rule, to compare the negligence of the plaintiff with that of the defendant, in order to determine the quantum of damages he is entitled to recover; and the comparison cannot be made with some standard outside the case . . . The Court must apportion the damages according to the relative amount of negligence of the parties, or the jury must do likewise if it tries the case."

In all the cases construing this statute which have come to our attention, the question is treated as one of proportions. In *Southern Ry. Co. v. Hill,* 139 Ga., 549, it is said that "damages should be diminished in proportion to the negligence attributable to the injured employee," and in *Neil v. Idaho & W. R. Co.,* 22 Idaho, 74, it is held that "under said act of Congress, contributory negligence on the part of the plaintiff is not a bar to recovery, but damages must be dimin-

ished by the jury in proportion to the amount of negligence attributable to said employee."

The Supreme Court of North Carolina, in a case decided since the opinion was rendered in our case, has held that a charge which directs the jury that the damages shall be diminished in proportion to the amount of negligence attributable to the employee is correct, and that the proper interpretation of this language requires a comparison of the negligence of the injured employee with the total negligence of the carrier and the injured emlopyee.

In *Gray, Admx., v. Southern Ry. Co.,* decided by the Supreme Court of North Carolina December 23, 1914, the following charge is approved:

> "I have read the section of the Federal Act referring to contributory negligence. It is necessary now more particularly to direct your attention to the measure of the diminution in damages, in case you find that the plaintiff is entitled to damages, on account of the contributory negligence. The section that I refer to says that *the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. This means that the damages shall be diminished in proportion to the amount of the employee's negligence; that is, that the damages shall be diminished by the jury in proportion to the employee's negligence as compared with the combined negligence of himself and the defendant.* In other words, the statutory direction that the diminution shall be in proportion to the amount of negligence attributable to such employee means that where the causal negligence, that is, the negligence causing the death, is partly attributable to the employee and partly to the carrier, the employee shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both, the purpose being to abrogate the common law rule exonerating the carrier from liability in such case, and to substitute a new rule confining the exoneration to a proportional part of the

damages corresponding to the amount of negligence attributable to the employee." (Italics added.)

In *Irvin v. Southern Ry. Co.*, 164 N. C., 11, the following charge is referred to as containing a correct statement of the effect of a finding of contributory negligence upon the issue of damages:

"As this action is brought under the act of Congress known as the 'Federal Employers' Liability Act,' its provisions govern the rights and liabilities of the plaintiff and the defendant, the Southern Railway Company, and all rules of law must be determined by and in accordance with its provisions, for it is absolutely exclusive as to the subject-matter of its provisions. The State law cannot govern in any aspect of the case.

"By virtue of the provisions of the Federal Employers' Liability Act, the fact that an employee may have been guilty of contributory negligence cannot, as it does under the State law, bar a recovery; but the damages, if the jury find that the plaintiff is entitled to damages, shall be diminished in proportion to the amount of negligence attributable to such employee. . . .

"Now, if you answer the first issue 'Yes,' to-wit, that the Southern Railway is chargeable with negligence, you should first consider the question of damages, without relation to the question of contributory negligence. If you find that the plaintiff's intestate was guilty of contributory negligence, it would then be your duty to reduce the amount of damages in proportion thereto, since the act provides that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee.

"I instruct you that this provision means this: If you find that the negligence of the two is equal; that is, that the railway company was guilty of negligence and the plaintiff's intestate was guilty of more negligence than the railway company, then the damages should be reduced more than one-half. If he was guilty of less negligence than the railway company, then the damages should not be reduced as much as one-half."

In the following cases it is held that under the Federal Employers' Liability Act it is proper to instruct the jury that if the employee contributes to his injury by his own negligence the damages shall be diminished in proportion to the negligence attributable to such employee:

Ridge v. Norfolk-Southern R. R. Co. (N. C.), 83 S. E., 762;
Irvin v. Southern Ry. Co., 164 N. C., 11;
Pfeiffer v. O. & W. R. & Nav. Co. (Or.), 144 Pac., 763.
Panky v. R. R. Co., 168 S. W., 274.

"The damages must be proportioned between the parties according to their respective fractions of the total negligence."

N. Y. C. & St. L. R. Co. v. Niebel, 214 F., 952.

In Illinois, where the doctrine of comparative negligence was in force for many years, the court recognized the necessity for instructing the jury to make a comparison of relative negligence of the plaintiff and the defendant, and in a number of cases it is held to be reversible error for the court to fail to refer to a standard of comparison.

In *P. C. & St. L. Ry. Co. v. Shannon*, 11 Ill. App., it is held:

"An instruction attempting to state the rule as to contributory negligence must refer to a standard of comparison of the negligence of both parties."

See also *C. & E. I. R. R. Co. v. O'Connor*, 13 Ill. App., 62.

"The doctrine of comparative negligence is founded upon a comparison of the negligence of the plaintiff with that of the defendant, and this element is of the very essence of the rule, and should be referred to in instructions upon that question."

Moody v. Peterson, Admr., 11 Ill. App., 180.

The case of *Norfolk & Western R. Co. v. Earnest, supra,*

has been cited with approval in the more recent case of *Grand Trunk W. R. Co. v. Lindsay,* 233 U. S., 42, in which the court says:

> "Coming to consider the proposition that although the case be governed by the Employers' Liability Act, error was nevertheless committed in sustaining the action of the trial court in refusing to give the requested instruction, we think that even if, for the sake of argument, it be assumed that the proof brought the case within *the principle of comparative negligence established by the Employers' Liability Act,* the correctness of the ruling of the Court below is clearly made manifest by the reasoning given by the Court for its conclusion. But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the safety appliance act and by the contributing negligence of the switchman in going between the cars. Under this condition of things it is manifest that the charge of the Court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the third section of the Employers' Liability Act a recovery is not prevented in a case of contributory negligence, since *the statute substitutes for it a system of comparative negligence, whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier*— in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee (*Norfolk & W. R. Co. v. Earnest,* 229 U. S., 114, 122); nevertheless, under the terms of a proviso to the section, contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of

> Congress enacted to promote the safety of employees. In that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery, but for all purposes. The proviso reads:
>
> 'Provided, That no such employee who may be injured jured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'" (Italics added.)

It is apparent that any instruction on the question of diminution of damages in the Lindsay case was more favorable to plaintiff in error than was authorized by the statute, because upon the facts of that case, there being a violation of a Federal statute enacted for the safety of the employee, the Federal Employers' Liability Act completely eliminates the defense of contributory negligence and does not permit it to be considered in diminution of damages. It was plain in that case that plaintiff in error was *not* prejudiced by the instruction to the jury.

In our case, the character of the negligence of the defendant, and the gross negligence of the plaintiff in failing to exercise the slightest degree of care for the safety of his train, seems to us to demonstrate that the jury did not consider plaintiff's negligence in its relation to the total negligence of plaintiff and defendant, but were guided by the charge of the Court and exercised their discretion in determining what they considered a reasonable amount in dollars and cents to be deducted from the total amount of damages sustained. We do not know the *total amount* of damages found by the jury, and we have no means of ascertaining it. It is, therefore, impossible to say in what amount it was diminished, or whether it was diminished at all. It is certain, however, that the charge of the trial court "gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts."

It is not essential that the party complaining shall demonstrate to a mathematical certainty that the verdict would have been smaller under a correct instruction on the issue of damages. It is sufficient to constitute reversible error if it appears that the jurors were permitted to assess the damages without a rule to guide them, or were guided by an erroneous rule, or were free to indulge in speculation and conjecture.

So, in the case of *Norfolk & Western Railroad Company v. Sarah E. Holbrook, Administratrix of W. T. Holbrook,* decided January 5, 1915, the following sentence, in a charge on the issue of damages unobjectionable in other respects, was held to be erroneous and sufficient to require a reversal of the judgment rendered:

> "The Court instructs you that where the persons suffering injury are the dependent widow and infant children of the deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were merely next of kin."

In holding that this language was prejudicial to the plaintiff in error, Mr. Justice McReynolds, delivering the opinion of the court, says:

> "In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed. But there was nothing—indeed there could be nothing—to show the hypothetic injury that might have befallen some unidentified adult beneficiary or dependent next of kin. The ascertained circumstances must govern in every case. There was no occasion to compare the rights of the actual beneficiaries

> with those of supposed dependents; and we think the trial Court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. *This gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts. Insurance Co. v. Baring,* 20 Wall., 159, 161." (Italics added.)

Defendant in error contends that it is incorrect to say that if the jury found that the negligence of the plaintiff was equivalent to the damages that would make the damages nothing, and that such instruction was more favorable to defendant than the statute justified.

Conceding that the statement is not correct that if the jury found that the contributory negligence of the plaintiff was equivalent to the damages that would make his damages nothing, and that it is unfavorable to the plaintiff, yet that is the only aspect in which the charge can be considered unfavorable to the plaintiff, because unless the jury found the contributory negligence and the damages to be exactly equal, they would even under this instruction, apply a rule highly prejudicial to the defendant—that is, if the jury found the contributory negligence of the plaintiff to be less than the damages, they would *deduct a reasonable allowance for such negligence without regard to any rule for the determination of such reasonable allowance other than the discretion of the jury.* This error is repeated throughout the charge. In one place the court instructs the jury: "You would assess the damages he would be entitled to and then deduct whatever amount *you think* would be proper for the contributory negligence." Again the court says: "You would deduct a reasonable amount from the damages as an allowance for contributory negligence. You would allow all that he would be

entitled to for damages, and then if you find he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages." The court does not even say, as contended by the defendant in error, that the amount to be deducted should be the equivalent of the contributory negligence of plaintiff. The members of the jury are told that they would make a reasonable allowance for whatever they thought such contributory negligence would be equivalent to. We submit that this charge is erroneous because it gives the jury no standard by which to determine the equivalent of plaintiff's contributory negligence. It is not proper for the jury to find what they think the contributory negligence of the plaintiff is equivalent to in dollars and cents, and deduct that amount from the total amount of damages, but the specific direction of the statute is that the damages shall be diminished in proportion to the negligence attributable to the employee, such proportion to be determined by a comparison of the negligence of the injured employee with the total negligence of such employee and the carrier. For example, should the jury find the total amount of damages to be $10,000 and that in their opinion the negligence of the injured employee was equivalent to $2,500, which the jury regarded as a reasonable allowance for the employee's negligence, the result would be, upon an application of the rule laid down by the trial court, a verdict for $7,500, but it is possible that the jury, upon applying the rule fixed by the statute, would have found that the negligence of the employee, in its relation to the total negligence of the carrier and employee, was one-half; that is, that the negligence of each was the same, and in that event, it would be their duty to diminish the amount of damages in proportion to the negligence attributable to such employee, which would, in the case supposed, result in a verdict for $5,000.

It will be noted that the statute does not provide that dam-

ages shall be diminished by the negligence attributable to the employee or its equivalent, but *shall be diminished in proportion* to such negligence.

After quoting the instructions of the trial court as originally given and as modified upon the return of the jury for further instructions, Mr. Justice Walker, in his dissenting opinion, seems to us to establish conclusively the prejudice sustained by the defendant. He says:

> "Waiving the confusion in the last instruction, which is alleged by the appellant, and the clear error in the first one, I proceed to consider the correctness of the instruction given to the jury at their request, in explanation of the first and erroneous one. The appellant assigns the following specific errors to these instructions, which I think are well taken: (1) They lay down no rule for the guidance of the jury, but leave the matter subject entirely to the exercise of their discretion; (2) they do not conform to the directions of section 3 of the Federal Employers' Liability Act; and (3) they do not contain the statement that the damages shall be diminished, but merely that the jury *would* deduct a reasonable amount for contributory negligence.
>
> "The jury answered the issue of negligence 'Yes,' the issue of contributory negligence 'Yes,' and the issue of damages '$7,000.' What they found the total amount of damages to be does not appear, and cannot be determined. The answer to the issue, '$7,000,' may be the remainder after deducting ten thousand dollars or ten cents, just as the jury may have found such amount to be a reasonable deduction for the contributory negligence. Or the jury could very readily have regarded the matter of making any deduction at all as within their discretion, and $7,000 may be their finding of the total damages sustained by the plaintiff. However that may be, the defendant was entitled to a correct instruction as to the effect of plaintiff's contributory negligence on the damages to which plaintiff would be entitled, and the

failure to give a correct instruction would be such error as would entitle defendant to *a new trial of all the issues.* It would be impossible for another jury to pass upon the issue of damages alone, because it would be necessary to determine the relative negligence of defendant and plaintiff in order to measure the damages. Under the Employers' Liability Act, the issues of negligence and damages would seem to be inseparable, as each bears upon the other. The combined negligence of both parties must be compared with the negligence of each in order to apportion the damages, as the act requires the jury to do.

"It is to be presumed that the jury would have been controlled by a correct instruction, and therefore there can be no presumption that the jury, by forming an estimate of a reasonable amount, arrived at the same or a smaller figure than they would have reached after considering the matter under a charge requiring them to diminish the damages in proportion to the amount of negligence attributable to the plaintiff."

Certainly, upon a proper application of the Federal Act, the result of the action might have been different.

North Carolina R. Co. v. Zachary, 232 U. S., 248.

REFUSAL TO GIVE REQUESTED INSTRUCTIONS ON ISSUE OF NEGLIGENCE.

The defendant requested several instructions on the issue of ~~damages~~ negligence, which, if given, would presumably have resulted in a verdict for defendant. These instructions presented in varying aspects, the contention of the defendant that the plaintiff's violation of defendant's rules was the sole proximate cause of his injury.

Defendant requested the following instructions:

"Upon the plaintiff's own evidence the Court instructs you that if you find that he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was such a doubtful character that it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was, and if he had done so

the collision would have been prevented, then his failure to stop at Granite was negligence on his part, and if you find that it was the sole proximate cause of the injury you will answer the issue of negligence 'No.'" (Printed record, page --; assignment of error No. ---.)

"If you find from the evidence that this collision was caused by the failure of the plaintiff to observe the rules of the defendant company, you will answer the issue of negligence 'No.'" (Printed record, page --, assignment of error No. -----.)

"If you find from the evidence that the plaintiff was in doubt as to the meeting point of train No. 84 with train No. 81, and you should further find that defendant's rules required him in case of doubt to pursue the safe course, and you should find that the safe course would have been to have stopped his train at Granite, and that by stopping his train at Granite the collision would have been prevented, and the plaintiff would not have been injured, you will answer the issue of negligence 'No.'" (Printed record, page --; assignment of error No. ---.)

"If you find from the evidence that the rules of the defendant required the plaintiff, in case of doubt or uncertainty, to take the safe course, and that the safe course would have been to have stopped train No. 84 at Granite, and that by stopping train No. 84 at Granite the collision would have been prevented, you will answer the issue of negligence 'No.'" (Printed record, page --; assignment of error No. ---.)

"It was the duty of the plaintiff under the rules of the defendant, in case of doubt or uncertainty as to the meeting point of train No. 84 with train No. 81, to have stopped his train at Granite, and if you find that he was in doubt or uncertainty as to such meeting point, and his failure to stop at Granite was the proximate cause of his injury, you will answer the issue of negligence 'No.'" (Printed record, page --; assignment of error No. ---.)

The Court did not submit this phase of the case on the

issue of negligence, but instructed the jury on the issue of contributory negligence as follows:

> "Now, upon the plaintiff's evidence, if you find that he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was of such a nature, of such doubtful character that it was uncertain as to whether it was Grandy or Granite, then it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was, and if you find that to be the fact, and that if he had done so the collision would have been prevented, and that his failure to stop at Granite under the circumstances was negligence on his part, and that it was the proximate cause of the injury, you would answer the second issue 'Yes,' if shown by the greater weight of the evidence. If you find from the evidence that the plaintiff had a doubt as to whether the order received by him read Grandy, or if there was reasonable grounds for him to doubt it, it was his duty to stop at the first station, unless he had found this doubt out or had reasonable grounds to find it out before leaving Norlina, in which case it was his duty to remain at Norlina until all reasonable doubt was removed. And so if you find that he had such doubt, or reasonable grounds for it, and did not pursue the safe course, and that by reason of his failure to do so the collision occurred, that that was the proximate cause of it, then you will answer the issue as to contributory negligence 'Yes.' And you would consider all the evidence throwing any light upon that question, both the defendant's evidence, the plaintiff's evidence, and the evidence of the baggagemaster and all the other witnesses that throw any light upon that question." (Printed record, page ___.)

The instruction given is not equivalent to a compliance with defendant's requests because of the difference in result in a negative response to the issue of negligence and an affirmative response to the issue of contributory negligence. The jury having answered the latter issue "Yes," presumably if the

instruction had been made to relate to the issue of negligence their response to that issue would have been "No."

Seaboard Air Line Railway v. Horton, 233 U. S., 492.

Defendant was entitled to the instruction that if plaintiff's negligence was the sole proximate cause of his injury, the issue of negligence on the part of defendant should be answered "No."

Grand Trunk W. Ry. Co. v. Lindsay, 233 U. S., 42.
Ellis's Admr. v. Louisville H. & St. L. R. Co., 155 Ky., 745.

If plaintiff violated a rule of the defendant, and if he could have avoided the collision by its observance, he was guilty of negligence as a matter of law, and if such negligence was the sole proximate cause of the injury, plaintiff cannot recover.

Pfeiffer v. O. & W. R. & Nav. Co. (Or.), 144 Pac., 763.

The doctrine of comparative negligence and apportionment of damages does not apply where the injured person's own negligence was the sole cause of the injury.

Railroad v. Auchinachie, (Ga.), 83 S. E., 127.

In the present case the question of proximate cause is an important factor, and yet the trial court nowhere defines the term. The jury is left to determine for itself the meaning of this technical term and to apply it to the facts as they were found to be. This omission is important particularly in view of the instruction that defendant's negligence must be found to be the proximate cause of the injury sustained by plaintiff before liability would be incurred. The trial Court gave the following instruction on the issue of negligence:

"If the jury find from the evidence that the defendant negligently delivered to the plaintiff an order that his train No. 84 should meet train No. 81 at a station,

> Grandy, and negligently gave to the conductor of train No. 81 an order to meet train No. 84 at Granite, and that this negligence on the part of the defendant was the proximate cause of the plaintiff's injury, and is established by the greater weight of the evidence, you will answer the first issue 'Yes.'" (Printed record, page -----)

The charge does not contain a more definite reference to proximate cause than appears in this instruction.

Was plaintiff's negligence the sole cause of the collision? We contend that upon facts of this case, this is a question for the jury. If the defendant could not have reasonably foreseen that the giving an order of a doubtful character would likely result in injury to some one, then such act was not the proximate cause of the injury sustained by plaintiff. "Reasonable foresight" of harm is an essential ingredient of actionable negligence.

> "A finding that negligence, or an act amounting to wanton wrong, is the proximate cause of an injury, is not warranted, unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."
>
> *Milwaukee & St. P. Ry. Co. v. Kellogg,* 94 U. S., 469.
>
> *Atchison, T. & S. F. Ry. Co. v. Calhoun,* 213 U. S., 1.

It is necessary in order to create liability under the Federal Employers' Liability Act that there shall be *negligence* on the part of the carrier. The carrier is not an insurer of the safety of the employee.

> *Seaboard Air Line Ry. v. Horton, supra.*
> *Milwaukee & St. P. Ry. Co. v. Kellogg, supra.*

If there is an intervening cause which produces a result out of the natural course of events, the prior conduct of the

defendant does not become a *cause* in the sense of creating liability for the resulting injury.

Union Pac. R. Co. v. Callaghan, 56 F., 988.

Could the defendant reasonably foresee that plaintiff would disregard its rules and run past a station when he was in doubt as to whether it was the meeting point of his train with a train running in the opposite direction? The rules were intended to cover the very situation that might be created by a doubtful order. If no situation of danger were created, it would be useless to direct the employee to pursue the safe course and run no risk. The order given plaintiff, if conceded to be of a doubtful character, when read in the light of the defendant's rules, did not direct him to proceed to *Grandy*, but directed him to stop at *Granite* and determine whether that was the correct meeting point for his train with train No. 81.

> "Viewed with reference to the test of anticipation or non-anticipation, the essential significance of the doctrine as to contributory negligence is that such negligence is never a contingency which the master is bound to take into account or look forward to as a possibility to be provided against. Hence, the legal connection between the wrongful act and the injury is invariably deemed to have been broken whenever the evidence shows that the negligence of the injured servant himself was the efficient cause of the injury."
>
> 2 Labatt on Master and Servant (1st Ed.), Sec. 810.

The last conscious agent in producing the injury is the party liable for it.

1 Bevan, Negligence (3rd Ed.), 53.

We submit that the defendant was entitled to an instruction that if plaintiff's negligence was the *sole proximate cause of the injury*, he would not be entitled to recover damages.

The instruction requested and refused, that if the collision was caused by failure of plaintiff to observe the defendant's

rules, the issue of negligence should be answered "No" is fully supported by the evidence and by authority.

Whitson v. Wrenn, 134 N. C., 86.
Stewart v. Carpet Co., 138 N. C., 60.
Holland v. Seaboard A. L. Ry., 143 N. C., 435.

The record contained assignments of error, other than those discussed herein, which establish the jurisdiction of this Court, and disclose prejudicial error in the judgment of the Supreme Cuort of North Carolina. These assignments of error relate to the admission of incompetent evidence on the issue of damages. The fact that the Employers' Liability Act, Section 1, creates a liability for *damages* sustained by an injured employee makes it impossible, we contend, to measure such damages without construing this language of the act, and we contend, further, that error in the admission of incompetent testimony on the issue of damages constitutes a denial of a right arising under the Federal law as certainly as erroneous instructions on the measure of damages constitutes the denial of such right.

Gulf, etc., Ry. Co. v. McGinnis, 228 U. S., 173.
Norfolk & Western R. Co. v. Holbrook, decided January 5, 1915.

Finally, we earnestly submit that we have established the following conclusions: (1) That this Court has jurisdiction; (2) that plaintiff in error has been denied rights arising under the Federal act, and the judgment of the Supreme Court of North Carolina should be reversed; and (3) that if the Court should be in doubt as to the latter conclusion, the questions involved are of such character as to require a full presentation of the same upon the oral argument, which cannot be made in the time allotted on the call of the summary docket.

Respectfully submitted,

MURRAY ALLEN,
Attorney for Plaintiff in Error.

Raleigh, N. C., January 25, 1915.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
v.
W. B. TILGHMAN,
Defendant in Error.

No. 713

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

REPLY BRIEF OF DEFENDANT IN ERROR.

A statement of this case having been made by the defendant in a brief heretofore filed in this Court, we proceed to concisely answer the argument of the Plaintiff in Error in the order set forth in its "Brief on the Merits."

On page 11 of Plaintiff in Error's brief under consideration, it is assumed that "The verdict of the jury demonstrates conclusively, that the first issue was answered 'yes,' upon the theory that the defendant (The Plaintiff in Error) was negligent in giving plaintiff (Defendant in Error) a train order so written that the meeting point with train 81 was not *clear.*"

Conceding this to be true for the purposes of argument, can it be that the negligence of the Plaintiff in Error can be questioned? If the Plaintiff in Error gave to the conductor a meeting order so negligently written as to appear

from the examination thereof by the conductor, baggage-master, and engineer to be "Grandy," when it was intended to be "Granite," the answer to the first issue must in any view of the case have been "Yes."

In order that Plaintiff in Error may carry out its conclusion, it is assumed that the Defendant in Error was "Seriously in doubt whether Granite was not the proper meeting point," but by reference to page 88 of the printed record the Court will find that the Defendant in Error testified that "The final word of the order they gave to run by was clear. *I had no doubt that it was Grandy.* I read it as the rules required me to. Mr. Beckham, the engineer, was the first man who read the order when I reached the train that time. He read it 'Number 84 engine 91 will meet number 81 engine 93 at Grandy.' There was no hesitancy about his reading it that way. There was no doubt he said *Grandy.* * * * Mr. Bryant occupied the position of baggagemaster and rear flagman on that train. I held up the order and Bryant read it in my hand. When he came to the word 'Grandy' I made him spell it out *'G-r-a-n-d-y'.*"

The following instructions on page 101 and 102 of the printed record were given to the jury by the trial judge on this question and no objection or exception was taken thereto by the Plaintiff in Error:

> "And if the jury shall find from the evidence that the defendant negligently gave the plaintiff an order relative to the meeting place of trains numbers 84 and 81 by which it was intended to designate the meeting place at Granite and that the same was carelessly written, so carelessly written that the name of the meeting place, when inspected with care of an ordinary prudent person under the plaintiff's circumstances, clearly appeared to be Grandy, and if the jury shall further find from the evidence that the plaintiff in reading and acting

upon such order exercised the care of an ordinary prudent person under the circumstances and read same Grandy after exercising the prudence of a preson under those circumstances, which I should say required careful examination, and that then he had no doubt that the said word was Grandy, and that the plaintiff in the exercise of the care of a prudent person acting in the capacity of this plaintiff under the circumstances had no opportunity thereafter and prior to the collision which caused the injury, to ascertain such mistake, and that he did not so ascertain the same, then they would answer the issue 'No' as to contributory negligence, the burden, as I have already stated, being upon the defendant to show by the greater weight of the evidence that the plaintiff was guilty of contributory negligence, that is, the burden being upon him to establish this second issue."

ASSIGNMENT OF ERROR NUMBER SIX.

This request for instruction was given by the trial judge on page 101 of the printed record under Plaintiff in Error's exception number 89 and in fairer and more comprehensive language than that requested by the Plaintiff in Error.

ASSIGNMENT OF ERROR NUMBER TWELVE.

The trial judge gave these instructions on page 100 of the printed record, and on page 103 of the record under exception 94 of the Plaintiff in Error, the judge added to said instruction the following:

"If the plaintiff has failed to satisfy you by a preponderence of the evidence that he had an order to meet train number 81 at Grandy, or that the order was so negligently written as to be mislead-

ing when carefully read by one under these circumstances, then you would answer the issue of negligence 'No'."

This addition to the charge requested, was emminently proper, in that the Defendant in Error had been allowed (page 29 of the printed record) to amend his complaint by adding thereto the following:

> "In that the defendant negligently delivered to the plaintiff at Norlina, N. C. at the same time the train order aforesaid for the meeting of his said train No. 84 with train No. 81, written in such form and manner that if the same was intended to refer to any other meeting place than 'Grandy,' nevertheless the same was so negligently written that the word appeared to be 'Grandy'; and in that when the plaintiff read his said train order to the defendant before leaving Norlina, as he did so read it aloud in a plainly audible and distinct tone of voice, 'Grandy,' the defendant negligently assented to and approved the said reading and pronunciation of the said 'Grandy'; and in that thereafter and before the plaintiff's said train reached the station Granite, N. C., the defendant negligently twice read the said train order to the plaintiff and each time read and pronounced the same in respect to the meeting place therein designated 'Grandy'."

Assignment of Error Number Thirteen.

This prayer for instruction could not have been properly given by the Court: It leaves out the question of proximate cause and the courts have uniformly held that:

"The violation by an employee of a rule of his employer is not negligence *per se,* but is merely evidence of negligence for the consideration of the jury, upon the issue of contributory negligence.

Missouri, etc., R. R. Co. v. Pawkett, 28 Texas Civil Ap., 583.

San Antonia R. Co. v. Connolly, 27 Texas Civil Ap., 533.

Lake Shore and M. S. R. Co. v. Parker, 131 Ill., 557.

ASSIGNMENT OF ERROR NOS. 14, 15 AND 16.

These prayers for instructions, all bearing upon the same point, entirely eliminate the idea of the Plaintiff in Error's negligence in the giving of the meet order. They again assume that the Defendant in Error was *in doubt.* There is no evidence that the Defendant in Error was in doubt. The entire evidence goes to show clearly that the meet order was repeatedly and carefully examined by the conductor, baggagmaster and engineer, in order to fully establish in their minds the proper meeting place. That due and special care was given to this particular order because of the fact that the two stations of the plaintiff's line were similar in sound and chirography and that after such examination there remained no doubt in the mind of the plaintiff in error as to the proper meeting place. It was contended in this case, and is still urged here, that the prudence and commendable care which the plaintiff in error exercised in fully determining from the order the proper meeting place, should be turned against him as evidence that there still remained in his mind after all of his care and prudence, some kind of a doubt which should absolutely justify all negligence on the part of the Plaintiff in Error and fix him as the only negligent party to the transaction. If he had not examined the order carefully, the Plaintiff in Error might well have charged him with

such negligence, but it is rather a novel idea to us to attempt to use his extreme caution and prudence in ascertaining the meaning of the order as an evidence of his negligence.

See Bryant's evidence, page 86 of the printed record, and Tilghman's evidence, page 88 of the printed record.

The judge under the pleadings and evidence very properly submitted the question raised in the foregoing assignments of error under the issue of contributory negligence.

ASSIGNMENTS OF ERROR NOS. 27, 28, 29. 30, AND 31.

As we understand this case these exceptions taken all together being to the charge of the trial judge as given, bring up the only Federal question in the case. We have to some extent argued these exceptions in a brief heretofore filed in this court, but beg the indulgence of the Court to add thereto the following:

In passing upon the question of damages in an action for personal injuries the jury must use reason and common sense in making an allowance for depreciation in ability to labor or earn money, as well as in making an allowance for mental or physical suffering, and upon the whole, must make a *reasonable allowance.*

The same rule must be applied in the treatment of contributory negligence. There can be no difference in taking a given sum and reducing it by a *reasonable allowance* and diminishing the given amount by a finding. It must be concluded that the finding of the amount which is to diminish the given sum must be a *reasonable amount;* that is, controlled by *reason.*

It is claimed, however, in this case that the idea of *proportion,* declared in the act, may not have been the plan adopted by the jury in ascertaining the remainder which should constitute the judgment in this case. However, the result must have been the same, if the jury acted honestly,

which must be conceded. Let us illustrate: In the jury room the first issue to be passed upon is : "What is the whole amount of damages?" After the jury have considered the evidence they allow a *reasonable* sum, say, $10.000.00 Then comes the question of diminishing this sum on account of the negligence of the plaintiff. Suppose the jury should conclude that the plaintiff was equally negligent with the defendant. Under the act the plaintiff would be entitled to a judgment for $5,000.00. This would be a *reasonable allowance,* for the negligence of the plaintiff. No other sum could be based upon reason.

In what other way could the reasonable, honest, human mind get at a *reasonable allowance,* in order to deduct from the gross sum the dereliction of the party to be charged, except in duly considering the *proportion* of his negligence?

It may be claimed that the jury might arrive at the sum to be deducted in very many ways, but safeguarded with an oath, the intelligence, honesty and capacity of the jury must be conceded.

Mr. Justice McKenna in his dissenting opinion in the case of *Norfolk-Southern Railroad v. Hollbrook,* U. S. Adv. Ops. 1914, page 145, says:

> "The charge to a jury must be considered as a whole, not by isolated sentences and a jury as one of the tribunals of the country must be presumed to have some sense."

It cannot be considered that the jury would employ some arbitrary or foolish way in arriving at the amount to be deducted for contributory negligence, but, on the other hand it must be assumed that they will act in the *easiest* and only *rational* way.

The Congress never intended by this act to establish any novel rules for ascertaining the amount of damages; that

is in reaching the amount for mental anguish to charge so much "per ang" in physical suffering; so much "per groan;" or so much for a leg or an arm.

The whole finding must be based upon a reasonable allowance and this should be *reduced* or *diminished* by a *reasonable allowance.*

In getting at this *reasonable allowance* we repeat, that the only rational way of ascertaining the amount to be deducted is by comparison and proportion. Give the plaintiff credit for the whole amount of damages and charge to him his proportion of negligence.

The laws may declare and the judges may direct the juries most emphatically that they must take the whole amount of the damages found as a whole number and deduct therefrom the fractional part which is attributable to the plaintiff for his negligence and render judgment for the balance, and the juries will invariably work the proportion in dollars instead of figures or fractional parts thereof. The latter mode is just as reasonable as the former. Practically the same result is obtained.

In one case the jury would contend over the *fraction* and in the other case over the *dollars,* and in arriving at the dollars each intelligent juror would work out his dollars by his idea of the proportion of the plaintiff's negligence.

It is true the judge in the trial court started out in his charge, conveying the idea to the jury that if they found that the Defendant in Error's negligence equalled that of the Plaintiff in Error's negligence he would not be entitled to recover anything and it is further true that receding somewhat from that, the judge directed the jury to deduct a reasonable amount from the damages what they thought he

would be entitled to from the damages as an allowance for contributory ngligence, but in the closing part of his charge, which it is safe to assume that the jury acted under, he charged the jury as follows:

> "You would allow all that he would be entitled to for damages and then if you find that he was guilty of contributory negligence you would make a reasonable allowance for whatever you think that would be equivalent to and deduct that from the amount of damages."

The meaning of which is as follows:

MAKE A REASONABLE ALLOWANCE FOR WHAT YOU THINK HIS CONTRIBUTORY NEGLIGENCE WOULD BE EQUIVALENT TO AND DEDUCT THAT FROM THE AMOUNT OF DAMAGES.

The criticism of this Court of the charge in the case of *Norfolk-Western Railroad Co. v. Earnest,* 229 U. S., page 114, was because it directed or permitted the contributory negligence of the Defendant in Error to be made upon a *comparison of the Plaintiff in Error's negligence.* The concluding instructions of the trial judge in the case at bar is not open to such criticism, and even if it were equivalent to the construction and subject to the criticism referred to in the Earnest case, *supra,* then the Plaintiff in Error is certainly in no position to complain, as such instruction was more favorable to the Plaintiff in Error than the Statute authorized.

This case was very fully and fairly investigated by the trial court and a jury which rendered an exceedingly modest verdict, as an examination of the record will disclose and was fully presented to the Supreme Court of the State of North Carolina, and an extensive examination made by that court, and the defendant in error contends that no material harm

resulted to the Plaintiff in Error upon any Federal question presented to this Court in the assignments of error, and when the charge is read as a whole it will appear that a more favorable construction of the act under which this case was tried was given the Plaintiff in Error than it was entitled to.

Respectfully submitted,

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
Counsel for Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error.
v.
W. B. TILGHMAN,
Defendant in Error.
No. 713.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIF OF PLAINTIFF IN ERROR ON THE MERITS

STATEMENT OF THE CASE.

This case is before the Court on writ of error to the Supreme Court of North Carolina to review the judgment of that Court affirming a judgment rendered in the Superior Court of Wake County against the plaintiff in error. The action was brought and tried under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Ch. 149, U. S. Comp. Stat. Sup. 1911, p. 1322) to recover damages for personal injuries alleged to have been received by a conductor while employed by the defendant in interstate commerce. The jury found the defendant guilty of negligence, plaintiff guilty of contributory negligence, and assessed the damages at $7,000. Defendant appealed to the Supreme Court of North Carolina, and the judgment of the Superior Court was

affirmed at Fall Term, 1914, in an opinion rendered by Chief Justice Clark, from which Justices Walker and Brown dissented. The opinion of the Court and the dissenting opinion of Justice Walker will be found at pages 131 and 135 of the printed record.

Upon petition of the defendant, Chief Justice Clark allowed the writ of error which brings the case before this Court.

Defendant in error moved to dismiss the writ of error or affirm the opinion and judgment rendered by the Supreme Court of North Carolina; and, if the Court should desire to hear argument, to transfer the case to the summary docket.

The motion to transfer to the summary docket was allowed, and the case now comes up on that docket.

The question of jurisdiction has been foreclosed by numerous decisions of this Court, and a casual examination of the exceptions relied upon by the plaintiff in error will show that there is no merit in the motion to dismiss. The motion to affirm the judgment of the Supreme Court of North Carolina is, we think, equally without merit. If our positions on the questions of the construction and application of the Federal Employers' Liability Act are correct, the plaintiff in error has been grievously prejudiced by the judgment in this case, and has been denied important rights and privileges accorded it by that act. This is not only true as regards the instructions on the issue of damages and the relation of contributory negligence to the amount to be awarded, quoted in the brief of defendant in error, but it relates to instructions on the issue of negligence given and refused, to evidence erroneously admitted, and to other exceptions noted and assigned as error by the plaintiff in error.

The statement in brief of defendant in error that numerous exceptions were abandoned in the Supreme Court of North Carolina does not relate to any of the exceptions discussed herein, but refers merely to a number of minor exceptions relating to matters which passed from the case when plaintiff

eliminated several of the grounds of negligence by amending his complaint and by the withdrawal of evidence relating thereto.

In this statement of the case and argument we refer to the defendant in error as plaintiff and to plaintiff in error as defendant for convenience in expression.

Plaintiff brought this action to recover damages for personal injuries sustained in a collision on defendant's railroad near Granite, N. C., November 19, 1912. At the time of the collision plaintiff was employed as conductor on defendant's passenger train No. 84, running from Columbia, S. C., to Richmond, Va., and this train collided with southbound train No. 81, running from Richmond, Va., to Columbia, S. C., and to points south of Columbia.

At Norlina, N. C., on the trip north, the train in charge of plaintiff as conductor, No. 84, stopped, and plaintiff received an order fixing a meeting point with southbound train No. 81, and alleged negligence in connection with this order is the basis of plaintiff's claim for damages.

In the complaint, as originally filed, plaintiff alleged that his injury was due to the negligence of the defendant in ordering train No. 81 to meet train No. 84 at *Granite, N. C.*, and train No. 84 to meet train No. 81 at *Grandy, Va.* By an amendment of the complaint, made at the conclusion of the evidence, plaintiff alleged that the defendant was negligent in that it delivered to plaintiff at Norlina, N. C., a train order for the meeting of his train, No. 84, with train No. 81, "written in such form and manner that if the same was intended to refer to any other meeting place than 'Grandy,' nevertheless, the same was so negligently written that the word appeared to be 'Grandy;' and in that when the plaintiff read his said train order to the defendant before leaving Norlina, as he did so read it aloud in a plainly audible and distinct tone of voice, 'Grandy,' the defendant negligently assented to and approved the said reading and pronunciation of the said 'Grandy;' and in that thereafter and before the plaintiff's train reached the station, Granite, N. C., the defendant

negligently twice read the said train order to the plaintiff and each time read and pronounced the same in respect to the meeting place therein designated, 'Grandy.' " (Printed record, page 29.)

The case was tried by plaintiff's counsel principally upon the theory of negligence contained in the original complaint, that is, that conflicting orders were given the two trains. Upon the trial, defendant offered in evidence copy of the order which was found on the body of Engineer Beckham of train No. 84, which was a carbon copy of the order given plaintiff, Tilghman, at Norlina. (See Exhibit A, which is the original order, and Exhibit B, which is the office copy of the same order.) At the conclusion of all the evidence, plaintiff, over defendant's objection, amended his complaint as above set forth, to cover the theory that the order given him was written in such manner that the name of the station at which his train was to meet train No. 84, appeared to be Grandy and not Granite.

The defendant denied that the collision was in any manner due to its negligence, and pleaded contributory negligence and assumption of risk as defenses. The fact of the collision was not denied, but it was contended by the defendant that the sole cause of the collision was the negligence of the plaintiff himself in failing to properly read the order given him, and in failing to stop at Granite, N. C. It appeared in evidence that plaintiff's train had passed the station at Granite and was proceeding north to Grandy when the collision occurred. (Printed record, page 34.)

The plaintiff, W. B. Tilghman, testified that when he arrived at Norlina, N. C., on the run from Columbia, S. C., to Richmond, Va., on the morning of this collision, the operator at Norlina, by the name of Watson, gave him an order to meet train No. 81 at Grandy; that Grandy is about thirty or thirty-one miles from Norlina, and Granite is a little over seven miles from Norlina; that Granite is between Norlina and Grandy; that when he got this order to meet train No. 81,

he read it to the operator, as follows: "Order No. 9 is annulled. Train 84, Engine 91, will meet train 81, Engine 93, at Grandy;" that he used the word "Grandy" distinctly, and the operator didn't say anything; that he had two copies of the order and delivered one to Engineer Beckham, who read the order to him and read the station "Grandy;" (printed record, page 34) that when the train passed Granite it was running between fifty and sixty miles an hour. (Printed record, page 36.)

In considering the defendant's position, it may be taken as established that the order which was removed from the body of Engineer Beckham was an exact duplicate of the order delivered by Operator Watson to the plaintiff. This is true, because defendant requested instructions based upon that theory which the trial court refused to give. Under the rules of the defendant, the conductor is charged with the safety of his train. Plaintiff admitted this and in connection with his duty and the means available for its performance, he testified as follows: "I was in charge of train No. 84 that night, as conductor. The conductor has a means of communicating with the engineer on his train, by signal cord, placed at different places in different cars, not always in the same position. It is a whistle cord. In my train the whistle cord was in top of the car, down the center aisle where the conductor can reach up and signal the engineer. There is a means by which I can apply the emergency brake on each car that will stop the train. If the engineer of my train were doing anything contrary to orders that was liable to affect the safety of my train, I could stop him. In approaching a meeting point, the engineer gives a signal, the station blow, and the conductor acknowledges it, with one long blast of the whistle, to remind him of the meeting point, and he answers two short. But if the engineer did not answer, or if I thought that he overlooked it, I have means of stopping the train. And it would be my duty as conductor to stop the train. I was supposed to be looked upon as being responsible for the train. The conductor

had charge of the train. I was in charge of the train and could control the engineer when it was necessary. I could make him stop anywhere and stay there. I had authority to make him do anything I thought necessary for the safety of the train." (Printed record, page 37.)

The defendant contended that the doubt of the plaintiff as to the meeting point of his train with train 84 made it imperative for him to ascertain definitely such meeting point before leaving Norlina, and if such a doubt arose after leaving Norlina, it was his duty to stop at Granite to ascertain the correct meeting point.

The rules of the defendant, with which the plaintiff was entirely familiar, provided that in all cases of doubt or uncertainty, the conductor should take the safe course and run no risk. (Printed record, page 89.) If this course had been pursued, and this rule observed by the plaintiff, this collision would have been averted, and the plaintiff would not have sustained the injuries as alleged in his complaint. His own testimony establishes beyond question that if he had stopped at Granite, even for a few seconds, the collision would not have occurred. He says: "From Granite to the point of this collision, I suppose, was a quarter of a mile or over. It would have been only a very short while before 81 would have come into Granite; just a few seconds. *If I had stopped at Granite, I would have been there only a few seconds before 81 arrived. If I had stopped there on the main line 81 would have come in in a few seconds and would have taken the siding.* Mine was the superior train. I had the right of track and was on the main line. I would have kept the main line and 81 would have taken the siding. My train would have stayed on the main line. If I had stopped at the station at Granite I would have stayed right on the main line, and in a few seconds 81 would have come in sight." (Printed record, page 38, at bottom, and page 39.)

The plaintiff was fully cognizant of his duty, in the event the order received by him was of a doubtful character, and

he testified, to meet this position, that he had no doubt about the meeting point being Grandy. He would not admit that he was in doubt, because the force of such an admission was apparent, and he knew that under the rules of the defendant it was his duty, if there existed in his mind any doubt as to the proper meeting point, to stop at Granite in order to protect the train in his charge. On cross examination plaintiff's witness, Dodson, testified: "*It is the duty of the conductor in case of doubt to pursue the safe course. That is the requirement of the standard rules in effect upon all the railroads, not only applying to conductors, but all classes of railroad employees. This was the rule on the Seaboard at that time and now.* If a conductor was in doubt as to the meeting point fixed by a train order it would be his duty not to accept it. If he discovered it after he had accepted it, it would be his duty to stop immediately and make some effort to get the correct information concerning the order from the train dispatcher who gave it, if he detected that there was anything wrong with it after he accepted it. *If a conductor should have any question as to it between two points, as to which was the meeting point, and he reached one of those points, it would be his duty to ascertain from the proper officer of the company at which one of these points they were to meet. If there was a doubt and he reached one of the points, it would be his duty to stop there.*" (Printed record, p. 42,)

We submit that an examination of plaintiff's own evidence and the evidence of his witness, Bryant, will show that he was in serious doubt as to whether the order provided that the two trains should meet at Granite or Grandy. The witness, Bryant, who testified in behalf of the plaintiff, said: "Captain Tilghman came in the baggage car, as he usually does, and read his orders over to me. He read, No. 84 will meet No. 81 at Grandy, and as a rule I always repeated the meeting point back to him, so as to understand. I said meet 81 at Grandy, and then he made a remark, laid the order down, and made a remark that he did not like the idea of

having two stations on the same district with names so near alike, it was liable to cause a misunderstanding. Then he held his order up to the light in the top of the car, in this manner (illustrating) and read it over the second time, 'No. 81 at Grandy.' Then he came around some baggage from the door to where I was standing in the side of the car, where there was a mail rack and pigeon hole boxes where I was assorting my local mail, had my hands full of mail, with the order in his hand and says to me, 'This looks like Grandy to me, what does it look like to you?' I looked at the bottom of the order and said, 'It looks like Grandy to me.' (Counsel holds up framed copy of the order.) This order in this condition is more deeply outlined, heap more plainer. The copy I saw was very dull. The one I saw looked like Grandy." (Printed record, page 86.)

If the order offered in evidence by the defendant is a duplicate of the order on which plaintiff was operating his train, upon the plaintiff's contention that he was given a doubtful order, its doubtful character appears upon its face, and it is either Granite or it is so written that it might be read Granite or Grandy, and it is sufficient in itself to support the instructions requested by the defendant, based upon the failure of the plaintiff to pursue the safe course as required by the defendant's rules. Upon this copy being exhibited to the plaintiff, he said that he did not see how you could make anything out of the name of the station appearing thereon. (Printed record, page 88.) This establishes the fact that if the plaintiff had been operating his train upon this order, he would have deemed it his duty in the observance of the defendant's rules to stop at Granite and not to proceed further until he had ascertained definitely the meeting point for his train and train No. 81.

The defendant showed by John D. Lanier, employed as train dispatcher at Richmond, Va., that he transmitted the order over the telephone to operator Watson at Norlina and operator Perkinson at La Crosse, Va. Lanier testified

that the order was transmitted to Watson on the telephone and while being transmitted it was copied by Watson. He then repeated it to the dispatcher; that when Watson reached the name of the station, he spelled it out distinctly G-r-a-n-i-t-e; that it was pronounced and then spelled; that after the order was transmitted to Watson, he asked him if he had it Granite and Watson said, "Yes, Granite." (Printed record, page 58.)

J. L. Watson, defendant's operator at Norlina, N. C., testified that he received this order over the telephone from the dispatcher on the morning of the collision; that the copy, Exhibit B, is the copy of the order which was retained by him in his office, and that the copy, Exhibit A, is an exact duplicate of the order which he gave conductor Tilghman. He testified that the order was made in triplicate by the use of carbons; that he wrote it down as he received it over the telephone; that after he received this order, he spelled the name of the station over the telephone to the dispatcher at Richmond, G-r-a-n-i-t-e, and that he again spelled it over the telephone, after it was made complete by the signature of the conductor. He testified further that conductor Tilghman read the order over to him, and read the meeting point as Granite. (Printed record, page 53.)

L. W. Perkinson testified that he was operator for the defendant at La Crosse, Va.; that he was on the telephone line with the operator at Norlina, N. C., and dispatcher at Richmond, Va., and heard the order given for train 81 to meet train 84 at Granite, and that he heard the operator at Norlina spell the meeting place, G-r-a-n-i-t-e; that the same order was intended for him, to be given by him to conductor of southbound train 81; that he copied it at the time and gave a copy to Shannonhouse, conductor on train 81. The copy of the order delivered to conductor Shannonhouse appears in the record as Exhibit D, and shows the meeting point to be Granite. (Printed record, page 108.)

The defendant showed by the testimony of W. B. Carlyle, Walter Moore, J. R. Bissett, H. W. Stanley and W. L. Stanley, that the copy of order offered in evidence as Exhibit A, was found on the body of engineer Beckham after the collision. (Printed record, pages 61, 62, 73 and 74.)

C. E. Matthews, one of defendant's conductors, who has been in the railroad service for fifteen years, testified that if a conductor has doubt about the meeting point fixed by his train order, it is his duty to stop at the first station and have it corrected or straightened out and to satisfy himself that he was right; that when he reached one of the stations about which he was in doubt, it would be his duty to stop. (Printed record, page 65.)

W. P. Clements, a conductor of twenty-five years' experience, testified: "It is the duty of a conductor in case of doubt to take the safe side and run no risk. If a conductor should get an order fixing a meeting place and he was in doubt about the meeting point, it would be his duty to stop immediately. *If the conductor should reach one of the points that created the doubt, it would be his duty to stop there and find out.*" (Printed record, page 66.)

L. W. Renn, one of defendant's conductors, testified that it was necessary for him to know the meeting point of trains 84 and 81 in handling his train at Norlina, and that on the morning of this collision, and before the collision occurred, he read the order addressed to conductor of train 84, and read the meeting point "Granite" and told his engineer that the meeting point was Granite, and this information was used in operating his train at Norlina. (Printed record, page 63.) This was corroborated by Engineer Tudor. (Printed record, page 64.)

Issues were submitted to the jury and answered as follows:

1. Was the plaintiff injured by the negligence of the de-

fendant as alleged in the complaint and the amendment thereto?

A. "Yes."

2. Did the plaintiff contribute to his injury by his negligence as alleged in the answer?

A. "Yes."

3. What damages is the plaintiff entitled to recover?

A. "$7,000."

(Printed record, page 31.)

The verdict of the jury demonstrates conclusively that the first issue was answered "Yes" upon the theory that the defendant was negligent in giving plaintiff a train order so written that the meeting point with train No. 81 was not clear. This is true because if the jury had found that plaintiff was given an order for train No. 84, which was in his charge, to meet train No. 81 at Grandy, and the conductor of train No. 81 was given an order to meet train No. 84 at Granite, there is no possible theory upon which plaintiff could be charged with contributory negligence. Upon that state of facts, he would not have been guilty of negligence, but would have been conforming strictly to the rules of the defendant in proceeding to Grandy, expecting to meet train No. 81 at that point, and the collision would have resulted entirely from the defendant's negligence. The exclusive cause of the collision would have been defendant's negligence in so directing the movement of its trains as to bring about a collision.

The jury found the plaintiff guilty of contributory negligence—a result which negatives the theory that the trains were given conflicting orders and establishes that the jury proceeded upon the theory that plaintiff was given an order, a duplicate of Exhibit A, and that the meeting point was made doubtful by the manner in which the name of the station was written. The fact that the jury answered the issues in this way emphasizes the importance of correct instructions on the effect of plaintiff's failure to observe the defendant's rule in

the event he received a doubtful order, because presumably the jury would have followed such instructions and would have answered the issues as directed by such instructions. This would have resulted in a verdict for defendant.

The jury's finding that plaintiff was guilty of contributory negligence can mean but one thing in this case, and that is, that he accepted an order which he says was so badly written that you cannot make anything out of the meeting point; he proceeded on that order upon the assumption that it was Grandy; he seriously doubted whether Granite was not the proper meeting point; and, yet, he passed Granite with his train running at the speed of more than fifty miles an hour. If he had observed the simple requirement of the defendant's rule and in case of doubt pursued the safe course, he would have stopped at Granite, and the collision and resulting loss of life and property would have been averted.

SPECIFICATIONS OF ERROR.

The plaintiff in error specifies and relies upon the following errors committed by the Supreme Court of North Carolina:

ASSIGNMENT OF ERROR No. 6.

(Exception No. 61, printed record, page 94.)

6. For that the Supreme Court of North Carolina erred in overruling the 61st exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's request, to charge the jury as follows:

"Upon the plaintiff's own evidence the Court instructs you that if you find that he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was of such a doubtful character that it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was, and if he had done so the collision would have been prevented, then his failure to stop at Granite was negligence on

his part, and if you find that it was the sole proximate cause of the injury, you will answer the issue of negligence "No."

ASSIGNMENT OF ERROR No. 12.

(Exception No. 76, printed record, page 97.)

12. For that the Supreme Court of North Carolina erred in overruling the 76th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's request to charge the jury as follows:

"If you find from the evidence that plaintiff was given an order by the defendant's operator for train No. 84 to meet train No. 81 at Granite, you will answer the issue of negligence 'No.'"

ASSIGNMENT OF ERROR No. 13.

(Exception No. 77, printed record, page 97.)

13. For that the Supreme Court of North Carolina erred in overruling the 77th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's request to charge the jury as follows:

"If you find from the evidence that this collision was caused by the failure of the plaintiff to observe the rules of the defendant company, you will answer the issues of negligence 'No.'"

ASSIGNMENT OF ERROR No. 14.

(Exception No. 78, printed record, page 97.)

14. For that the Supreme Court of North Carolina erred in overruling the 78th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's request to charge the jury as follows:

"If you find from the evidence that the plaintiff was in doubt as to the meeting point of train No. 84 with train No. 81, and should further find that defendant's rules required him, in case of doubt, to pursue the safe

course, and you should find that the safe course would have been to have stopped his train at Granite, and that by stopping his train at Granite, the collision would have been prevented and the plaintiff would not have been injured, you will answer the issue of negligence 'No.'"

ASSIGNMENT OF ERROR No. 15.

(Exception No. 79, printed record, page 97.)

15. For that the Supreme Court of North Carolina erred in overruling the 79th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's request to charge the jury as follows:

"If you find from the evidence that the rules of the defendant required the plaintiff in case of doubt or uncertainty to take the safe course, and that the safe course would have been to have stopped train No. 84 at Granite, and that by stopping at Granite, the collision would have been prevented, you will answer the issue of negligence 'No.'"

ASSIGNMENT OF ERROR No. 16.

(Exception No. 80, printed record, page 97.)

16. For that the Supreme Court of North Carolina erred in overruling the 80th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's request to charge the jury as follows:

"It was the duty of the plaintiff under the rules of the defendant, in case of doubt or uncertainty as to the meeting point of train No. 84 with train No. 81, to have stopped his train at Granite, and if you find that he was in doubt or uncertainty as to such meeting point, and his failure to stop at Granite was the proximate cause of his injury, you will answer the issue of negligence 'No.'"

ASSIGNMENT OF ERROR No. 27.

(Exception No. 92, printed record, page 103.)

27. For that the Supreme Court of North Carolina erred in overruling the 92nd exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"And now another question comes in here, which is interesting because it is of recent application in our laws. I have sometimes said, if the gentleman will pardon me for saying so, that the jury have for many years been unconsciously applying it, but under this act under which this action is brought you are permitted to apply it if you find that he was guilty of contributory negligence. Ordinarily, when the jury have found that the defendant was guilty of contributory negligence, I mean where the defendant is guilty of negligence and that the plaintiff was guilty of negligence, where they answer both issues 'Yes,' then they give no damages, but under this act you are permitted to do it."

ASSIGNMENT OF ERROR No. 28.

(Exception No. 93, printed record, page 103.)

28. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 93rd exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury, as follows:

"If you answer the second issue 'Yes,' that is, if he was guilty of contributory negligence, and so if you should answer the two issues, 'Yes,' and come to the question of damages, you would assess his reasonable damages under the rule which I have laid down, and then you would make an allowance for his own negligence, and deduct that from his damages, if you find it was less than his damages. If you found it was equivalent, that would make his damages nothing, but if you found it was less, a reasonable allowance for his own negligence was less than the amount of his own damages, you would deduct it and find the result."

ASSIGNMENT OF ERROR No. 29.

(Exception No. 96, printed record, page 104.)

29. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 06th exception of the plaintiff in error, and in holding that the trial court committed no error in instructing the jury as follows:

"I don't think I would put it that way, but this way: If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you would answer that 'Yes,' and if you find that the plaintiff was guilty of contributory negligence, as charged, you will answer that second issue 'yes,' and then you would assess the damages that he would be entitled to, and then deduct from that whatever amount you think would be proper for the contributory negligence."

(ASSIGNMENT OF ERROR No. 30.

(Exception No. 97, printed record, page 104.)

30. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 97th exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

"I perhaps did say that if you found that his contributory negligence amounted to as much as the amount of damages, that it would be nothing, but I did not put it that way—if they were equally negligent that he would be entitled to nothing. It would not be that."

(ASSIGNMENT OF ERROR No. 31.

(Exception No. 98, printed record, page 105.)

31. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act of 1908, in overruling the 98th exception of the plaintiff in error,

and in holding that the trial court committed no error in instructing the jury as follows:

"But you would deduct a reasonable amount from the damages you think that he would be entitled to from the damages as an allowance for contributory negligence. It would be for you to say whether it is less or whether it is equal, but I did not put it just that way—that if they were equally guilty of negligence—but that you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence a reasonable amount for contributory negligence. You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages."

The questions presented in this case are:

First, the right of the defendant to certain instructions on the issue of negligence, presenting the contention that if plaintiff's failure to observe the rules of the company and pursue the safe course by stopping at Granite was the proximate cause of his injury, the jury should answer the issue of negligence "No." This question is raised by instructions requested by the defendant and refused by the trial court, as shown in Assignments of Error No. 6, Exception No. 61, printed record, page 94; No. 12, Exception No. 76, printed record, page 97; No. 13, Exception No. 77, printed record, page 97; No. 14, Exception No. 78, printed record, page 97; No. 15, Exception No. 79, printed record, page 97, and No. 16, Exception No. 80, printed record, page 97.

Second, the correctness of instructions of the trial court to the jury, to which the defendant duly excepted, on relation of contributory negligence to the measure of damages under the provisions of Section 3 of the Employers' Liability Act of April 22, 1908, 35 Stat. at L. 65, Ch. 149, U. S. Comp. Stat. Sup., 1911, page 1322, as shown in Assignments of Error No. 28, Exception No. 93, printed record, page 103;

No. 29, Exception No. 96, printed record, page 104, and No. 31, Exception No. 98, printed record, page 105.

In considering these questions, we have reversed this order, and will consider first erroneous instructions on the relation of contributory negligence to the issue of damages.

ARGUMENT.

I.

PLAINTIFF IN ERROR IS ENTITLED TO A REVERSAL OF THE JUDGMENT FOR ERROR IN INSTRUCTIONS ON THE RELATION OF CONTRIBUTORY NEGLIGENCE TO THE MEASURE OF DAMAGES.

ASSIGNMENTS OF ERROR NOS. 27, 28, 29, 30 AND 31.

The exceptions to the charge of the trial court on the relation of contributory negligence to the measure of damages are embodied in Assignments of Error Nos. 27, 28, 29, 30 and 31, and will be discussed together.

We submit that the mere reading of the language of section 3 of the Federal Employers' Liability Act and the language of the trial court in charging the jury will demonstrate the error of which we complain, and will establish the right of plaintiff in error to a reversal of the judgment of the Supreme Court of North Carolina.

THE STATUTE.

"The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

THE CHARGE.

"You would assess his reasonable damages under the rule which I have laid down and then **you would make an**

allowance for his own negligence and deduct that from his damages, if you find it was less than his damages. If you find it was equivalent, that would make his damages nothing, but if you found it was less—**a reasonable allowance for his own negligence was less than his own damages, you would deduct it and find the result.**" (Printed record, page 103; assignment of error No. 28.)

"If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you would answer that 'Yes,' and if you find that the plaintiff was guilty of contributory negligence as charged, you will answer that second issue 'Yes," and then you would assess the damages that he would be entitled to, **and then deduct from that whatever amount you think would be proper for the contributory negligence.**" (Printed record, page 104; assignment of error No. 29.)

"You would deduct a reasonable amount from the damages that you think that he would be entitled to from the damages as an allowance for contributory negligence. It would be for you to say whether it is less or whether it is equal, but I did not put it just that way—that if they were equally guilty of negligence—but that **you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence a reasonable amount for contributory negligence.** You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, **you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages."** (Printed record, page 105; assignment of error No. 31.)

If these instructions are compared with the charge as approved in *Norfolk & Western R. Co. v. Earnest*, 229 U. S.,

114, the error will become apparent. In that case Mr. Justice Vandevanter says:

> "The third section of the Employers' Liability Act declares, subject to a proviso not material here, that 'the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee;' and in its charge the Court dealt with the subject of contributory negligence as follows:
>
> 'Contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of dimunition of damages in proportion to his negligence, as compared with the negligence of the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.'
>
> An exception to this instruction was reserved, without suggesting any other objection to it than that the Employers' Liability Act was deemed unconstitutional. It is now criticized (a) because, instead of saying that, if the plaintiff was guilty of contributory negligence, the jury 'must diminish the damages,' it merely said that such negligence 'goes by way of diminution of damages,' and (b) because it prescribed a wrong rule for the diminution in that it directed or permitted it to be made upon a comparison of the plaintiff's negligence with that of the defendant. Both criticisms were advanced in the circuit court in support of a motion for a new trial, which was overruled, the Court stating that neither criticism had been suggested before.

We think there is no merit whatever in the first criticism. In one sentence the instruction plainly stated that the statute requires, where the plaintiff has been guilty of contributory negligence, that 'the damages shall be diminished by the jury;' and the statement in the next sentence that such negligence 'goes by way of diminution of damages' was evidently intended as a mere repetition of the statutory requirement in somewhat different words. Its purpose was to give effect to what went before, not to qualify it, and it is not reasonable to believe that the jury could have thought otherwise.

The other criticism deserves more discussion. The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words 'as compared with the negligence of the defendant,' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee,' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S., 1, 50."

Thornton, Employers' Liability Act (2nd Ed.), page 40, says:

> "Under the Federal Statute it becomes the duty of the Court if it is trying the case, or the jury if that is the method of trial, according to the Illinois rule, to compare the negligence of the plaintiff with that of the defendant, in order to determine the quantum of damages he is entitled to recover; and the comparison cannot be made with some standard outside the case . . . The Court must apportion the damages according to the relative amount of negligence of the parties, or the jury must do likewise if it tries the case."

In all the cases construing this statute which have come to our attention, the question is treated as one of proportions. In *Southern Ry. Co. v. Hill,* 139 Ga., 549, it is said that "damages should be diminished in proportion to the negligence attributable to the injured employee," and in *Neil v. Idaho & W. R. Co.,* 22 Idaho, 74, it is held that "under said act of Congress, contributory negligence on the part of the plaintiff is not a bar to recovery, but damages must be diminished by the jury in proportion to the amount of negligence attributable to said employee."

The Supreme Court of North Carolina, in a case decided since the opinion was rendered in our case, has held that a charge which directs the jury that the damages shall be diminished in proportion to the amount of negligence attributable to the employee is correct, and that the proper interpretation of this language requires a comparison of the negligence of the injured employee with the total negligence of the carrier and the injured employee.

In *Gray, Admx., v. Southern Ry. Co.,* decided by the Supreme Court of North Carolina December 23, 1914, the following charge is approved:

> "I have read the section of the Federal Act referring to contributory negligence. It is necessary now more particularly to direct your attention to the measure of the diminution in damages, in case you find that the plaintiff is entitled to damages, on account of the con-

tributory negligence. The section that I refer to says that *the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. This means that the damages shall be diminished in proportion to the amount of the employee's negligence; that is, that the damages shall be diminished by the jury in proportion to the employee's negligence as compared with the combined negligence of himself and the defendant.* In other words, the statutory direction that the diminution shall be in proportion to the amount of negligence attributable to such employee means that where the causal negligence, that is, the negligence causing the death, is partly attributable to the employee and partly to the carrier, the employee shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both, the purpose being to abrogate the common law rule exonerating the carrier from liability in such case, and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee." (Italics added.)

In *Irvin v. Southern Ry. Co.*, 164 N. C., 11, the following charge is referred to as containing a correct statement of the effect of a finding of contributory negligence upon the issue of damages:

"As this action is brought under the act of Congress known as the 'Federal Employers' Liability Act,' its provisions govern the rights and liabilities of the plaintiff and the defendant, the Southern Railway Company, and all rules of law must be determined by and in accordance with its provisions, for it is absolutely exclusive as to the subject-matter of its provisions. The State law cannot govern in any aspect of the case.

"By virtue of the provisions of the Federal Employers' Liability Act, the fact that an employee may have been guilty of contributory negligence cannot, as it does under the State law, bar a recovery; but the damages, if the jury find that the plaintiff is entitled to damages, shall be diminished in proportion to the amount of neg-

ligence attributable to such employee. . . .

"Now, if you answer the first issue 'Yes,' to-wit, that the Southern Railway is chargeable with negligence, you should first consider the question of damages, without relation to the question of contributory negligence. If you find that the plaintiff's intestate was guilty of contributory negligence, it would then be your duty to reduce the amount of damages in proportion thereto, since the act provides that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee.

"I instruct you that this provision means this: If you find that the negligence of the two is equal; that is, that the railway company was guilty of negligence and the plaintiff's intestate was guilty of more negligence than the railway company, then the damages should be reduced more than one-half. If he was guilty of less negligence than the railway company, then the damages should not be reduced as much as one-half."

In the following cases it is held that under the Federal Employers' Liability Act it is proper to instruct the jury that if the employee contributes to his injury by his own negligence the damages shall be diminished in proportion to the negligence attributable to such employee:

Ridge v. Norfolk-Southern R. R. Co. (N. C.), 83 S. E., 762;

Irvin v. Southern Ry. Co., 164 N. C., 11;

Pfeiffer v. O. & W. R. & Nav. Co. (Or.), 144 Pac., 763.

Panky v. R. R. Co., 168 S. W., 274.

"The damages must be proportioned between the parties according to their respective fractions of the total negligence."

N. Y. C. & St. L. R. Co. v. Niebel, 214 F., 952.

In Illinois, where the doctrine of comparative negligence was in force for many years, the court recognized the necessity for instructing the jury to make a comparison of rela-

tive negligence of the plaintiff and the defendant, and in a number of cases it is held to be reversible error for the court to fail to refer to a standard of comparison.

In *P. C. & St. L. Ry. Co. v. Shannon,* 11 Ill. App., it is held:

> "An instruction attempting to state the rule as to contributory negligence must refer to a standard of comparison of the negligence of both parties."

See also *C. & E. I. R. R. Co. v. O'Connor,* 13 Ill. App., 62.

> "The doctrine of comparative negligence is founded upon a comparison of the negligence of the plaintiff with that of the defendant, and this element is of the very essence of the rule, and should be referred to in instructions upon that question."
>
> *Moody v. Peterson, Admr.,* 11 Ill. App., 180.

The case of *Norfolk & Western R. Co. v. Earnest, supra,* has been cited with approval in the more recent case of *Grand Trunk W. R. Co. v. Lindsay,* 233 U. S., 42, in which the court says:

> "Coming to consider the proposition that although the case be governed by the Employers' Liability Act, error was nevertheless committed in sustaining the action of the trial court in refusing to give the requested instruction, we think that even if, for the sake of argument, it be assumed that the proof brought the case within *the principle of comparative negligence established by the Employers' Liability Act,* the correctness of the ruling of the Court below is clearly made manifest by the reasoning given by the Court for its conclusion. But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the safety appliance act and by the contributing negligence of the switchman in going

between the cars. Under this condition of things it is manifest that the charge of the Court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the third section of the Employers' Liability Act a recovery is not prevented in a case of contributory negligence, since *the statute substitutes for it a system of comparative negligence, whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier*— in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee (*Norfolk & W. R. Co. v. Earnest,* 229 U. S., 114, 122); nevertheless, under the terms of a proviso to the section, contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employees. In that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery, but for all purposes. The proviso reads:

'Provided, That no such employee who may be injured jured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' " (Italics added.)

It is apparent that any instruction on the question of diminution of damages in the Lindsay case was more favorable to plaintiff in error than was authorized by the statute, because upon the facts of that case, there being a violation of a Federal statute enacted for the safety of the employee, the Federal Employers' Liability Act completely eliminates the defense of contributory negligence and does not permit it to be considered in diminution of damages. It was plain in that case that plaintiff in error was *not* prejudiced by the instruction to the jury.

In our case, the character of the negligence of the defendant, and the gross negligence of the plaintiff in failing to exercise the slightest degree of care for the safety of his train, seems to us to demonstrate that the jury did not consider plaintiff's negligence in its relation to the total negligence of plaintiff and defendant, but were guided by the charge of the Court and exercised their discretion in determining what they considered a reasonable amount in dollars and cents to be deducted from the total amount of damages sustained. We do not know the *total amount* of damages found by the jury, and we have no means of ascertaining it. It is, therefore, impossible to say in what amount it was diminished, or whether it was diminished at all. It is certain, however, that the charge of the trial court "gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts."

It is not essential, we submit, that the party complaining shall demonstrate to a mathematical certainty that the verdict would have been smaller under a correct instruction on the issue of damages. It is sufficient to constitute reversible error if it appears that the jurors were permitted to assess the damages without a rule to guide them, or were guided by an erroneous rule, or were free to indulge in speculation and conjecture.

So, in the case of *Norfolk & Western Railroad Company v. Sarah E. Holbrook, Administratrix of W. T. Holbrook,* decided January 5, 1915, the following sentence, in a charge on the issue of damages unobjectionable in other respects, was held to be erroneous and sufficient to require a reversal of the judgment rendered:

> "The Court instructs you that where the persons suffering injury are the dependent widow and infant children of the deceased husband and father, the pecuniary injury suffered would be much greater than where the

beneficiaries were all adults or dependents who were merely next of kin."

In holding that this language was prejudicial to the plaintiff in error, Mr. Justice McReynolds, delivering the opinion of the court, says:

"In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed. But there was nothing—indeed there could be nothing—to show the hypothetic injury that might have befallen some unidentified adult beneficiary or dependent next of kin. The ascertained circumstances must govern in every case. There was no occasion to compare the rights of the actual beneficiaries with those of supposed dependents; and we think the trial Court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. *This gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts. Insurance Co. v. Baring,* 20 Wall., 159, 161." (Italics added.)

The plaintiff contends that it is incorrect to say that if the jury found that the negligence of the plaintiff was equivalent to the damages that would make the damages nothing, and that such instruction was more favorable to defendant than the statute justified.

Conceding that the statement is not correct that if the jury found that the contributory negligence of the plaintiff was

equivalent to the damages that would make his damages nothing, and that it is unfavorable to the plaintiff, yet that is the only aspect in which the charge can be considered unfavorable to the plaintiff, because unless the jury found the contributory negligence and the damages to be exactly equal, they would even under this instruction, apply a rule highly prejudicial to the defendant—that is, if the jury found the contributory negligence of the plaintiff to be less than the damages, they would *deduct a reasonable allowance for such negligence without regard to any rule for the determination of such reasonable allowance other than the discretion of the jury.* This error is repeated throughout the charge. In one place the court instructs the jury: "You would assess the damages he would be entitled to and then deduct whatever amount *you think* would be proper for the contributory negligence." Again the court says: "You would deduct a reasonable amount from the damages as an allowance for contributory negligence. You would allow all that he would be entitled to for damages, and then if you find he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages." The court does not even say, as contended by the defendant in error, that the amount to be deducted should be the equivalent of the contributory negligence of plaintiff. The members of the jury are told that they would make a reasonable allowance for whatever they thought such contributory negligence would be equivalent to. We submit that this charge is erroneous because it gives the jury no standard by which to determine the equivalent of plaintiff's contributory negligence. It is not proper for the jury to find what they think the contributory negligence of the plaintiff is equivalent to in dollars and cents, and deduct that amount from the total amount of damages, but the specific direction of the statute is that the damages shall be diminished in proportion to the negligence attributable to the employee, such proportion

to be determined by a comparison of the negligence of the injured employee with the total negligence of such employee and the carrier. For example, should the jury find the total amount of damages to be $10,000 and that in their opinion the negligence of the injured employee was equivalent to $2,500, which the jury regarded as a reasonable allowance for the employee's negligence, the result would be, upon an application of the rule laid down by the trial court, a verdict for $7,500, but it is possible that the jury, upon applying the rule fixed by the statute, would have found that the negligence of the employee, in its relation to the total negligence of the carrier and employee, was one-half; that is, that the negligence of each was the same, and in that event, it would be their duty to diminish the amount of damages in proportion to the negligence attributable to such employee, which would, in the case supposed, result in a verdict for $5,000.

It will be noted that the statute does not provide that damages shall be diminished by the negligence attributable to the employee or its equivalent, but *shall be diminished in proportion* to such negligence.

After quoting the instructions of the trial court as originally given and as modified upon the return of the jury for further instructions, Mr. Justice Walker, in his dissenting opinion (printed record, page 135), seems to us to establish conclusively the prejudice sustained by the defendant. He says:

> "Waiving the confusion in the last instruction, which is alleged by the appellant, and the clear error in the first one, I proceed to consider the correctness of the instruction given to the jury at their request, in explanation of the first and erroneous one. The appellant assigns the following specific errors to these instructions, which I think are well taken: (1) They lay down no rule for the guidance of the jury, but leave the matter subject entirely to the exercise of their discretion; (2) they do not conform to the directions of section 3 of the Federal Employers' Liability Act; and (3) they do not

contain the statement that the damages shall be diminished, but merely that the jury *would* deduct a reasonable amount for contributory negligence.

"The jury answered the issue of negligence 'Yes,' the issue of contributory negligence 'Yes,' and the issue of damages '$7,000.' What they found the total amount of damages to be does not appear, and cannot be determined. The answer to the issue, '$7,000,' may be the remainder after deducting ten thousand dollars or ten cents, just as the jury may have found such amount to be a reasonable deduction for the contributory negligence. Or the jury could very readily have regarded the matter of making any deduction at all as within their discretion, and $7,000 may be their finding of the total damages sustained by the plaintiff. However that may be, the defendant was entitled to a correct instruction as to the effect of plaintiff's contributory negligence on the damages to which plaintiff would be entitled, and the failure to give a correct instruction would be such error as would entitle defendant to *a new trial of all the issues.* It would be impossible for another jury to pass upon the issue of damages alone, because it would be necessary to determine the relative negligence of defendant and plaintiff in order to measure the damages. Under the Employers' Liability Act, the issues of negligence and damages would seem to be inseparable, as each bears upon the other. The combined negligence of both parties must be compared with the negligence of each in order to apportion the damages, as the act requires the jury to do.

"It is to be presumed that the jury would have been controlled by a correct instruction, and therefore there can be no presumption that the jury, by forming an estimate of a reasonable amount, arrived at the same or a smaller figure than they would have reached after considering the matter under a charge requiring them to diminish the damages in proportion to the amount of negligence attributable to the plaintiff."

Certainly, upon a proper application of the Federal Act, the result of the action might have been different.

North Carolina R. Co. v. Zachary, 232 U. S., 248.

II.

PLAINTIFF IN ERROR IS ENTITLED TO A REVERSAL OF THE JUDGMENT FOR ERROR IN REFUSAL TO GIVE REQUESTED INSTRUCTIONS ON ISSUE OF NEGLIGENCE.

ASSIGNMENTS OF ERROR NOS. 6, 13, 14, 15 AND 16.

The defendant requested several instructions on the issue of negligence, which, if given, would presumably have resulted in a verdict for defendant. These instructions presented in varying aspects, the contention of the defendant that the plaintiff's violation of defendant's rules was the sole proximate cause of his injury, and may be considered together.

Defendant requested the following instructions:

"Upon the plaintiff's own evidence the Court instructs you that if you find that he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was such a doubtful character that it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was, and if he had done so the collision would have been prevented, then his failure to stop at Granite was negligence on his part, and if you find that it was the sole proximate cause of the injury you will answer the issue of negligence 'No.'" (Printed record, page 94; assignment of error No. 6.)

"If you find from the evidence that the plaintiff was given an order by the defendant's operator for train No. 84 to meet train No. 81 at Granite, you will answer the issue of negligence 'No.'" (Printed record, page 97; assignment of error No. 12.)

"If you find from the evidence that this collision was caused by the failure of the plaintiff to observe the rules of the defendant company, you will answer the issue of negligence 'No.'" (Printed record, page 97, assignment of error No. 13.)

"If you find from the evidence that the plaintiff was

in doubt as to the meeting point of train No. 84 with train No. 81, and you should further find that defendant's rules required him in case of doubt to pursue the safe course, and you should find that the safe course would have been to have stopped his train at Granite, and that by stopping his train at Granite the collision would have been prevented, and the plaintiff would not have been injured, you will answer the issue of negligence 'No.'" (Printed record, page 97; assignment of error No. 14.)

"If you find from the evidence that the rules of the defendant required the plaintiff, in case of doubt or uncertainty, to take the safe course, and that the safe course would have been to have stopped train No. 84 at Granite, and that by stopping train No. 84 at Granite the collision would have been prevented, you will answer the issue of negligence 'No.'" (Printed record, page 97; assignment of error No. 15.)

"It was the duty of the plaintiff under the rules of the defendant, in case of doubt or uncertainty as to the meeting point of train No. 84 with train No. 81, to have stopped his train at Granite, and if you find that he was in doubt or uncertainty as to such meeting point, and his failure to stop at Granite was the proximate cause of his injury, you will answer the issue of negligence 'No.'" (Printed record, page 97; assignment of error No. 16.)

The Court did not submit this phase of the case on the issue of negligence, but instructed the jury on the issue of contributory negligence as follows:

"Now, upon the plaintiff's evidence, if you find that he received an order for train No. 84 to meet train No. 81 at Grandy, and that the order was of such a nature, of such doubtful character that it was uncertain as to whether it was Grandy or Granite, then it was his duty to have stopped at Granite for the purpose of ascertaining definitely what the order was, and if you find that to be the fact, and that if he had done so the collision

would have been prevented, and that his failure to stop at Granite under the circumstances was negligence on his part, and that it was the proximate cause of the injury, you would answer the second issue 'Yes,' if shown by the greater weight of the evidence. If you find from the evidence that the plaintiff had a doubt as to whether the order received by him read Grandy, or if there was reasonable grounds for him to doubt it, it was his duty to stop at the first station, unless he had found this doubt out or had reasonable grounds to find it out before leaving Norlina, in which case it was his duty to remain at Norlina until all reasonable doubt was removed. And so if you find that he had such doubt, or reasonable grounds for it, and did not pursue the safe course, and that by reason of his failure to do so the collision occurred, that that was the proximate cause of it, then you will answer the issue as to contributory negligence 'Yes.' And you would consider all the evidence throwing any light upon that question, both the defendant's evidence, the plaintiff's evidence, and the evidence of the baggagemaster and all the other witnesses that throw any light upon that question." (Printed record, page 101.)

The instruction given is not equivalent to a compliance with defendant's requests because of the difference in result in a negative response to the issue of negligence and an affirmative response to the issue of contributory negligence. The jury having answered the latter issue "Yes," presumably if the instruction had been made to relate to the issue of negligence their response to that issue would have been "No."

Seaboard Air Line Railway v. Horton, 233 U. S., 492.

Defendant was entitled to the instruction that if plaintiff's negligence was the sole proximate cause of his injury, the issue of negligence on the part of defendant should be answered "No."

Grand Trunk W. Ry. Co. v. Lindsay, 233 U. S., 42.
Ellis's Admr. v. Louisville H. & St. L. R. Co., 155 Ky., 745.

If plaintiff violated a rule of the defendant, and if he could have avoided the collision by its observance, he was guilty of negligence as a matter of law, and if such negligence was the sole proximate cause of the injury, plaintiff cannot recover.

Pfeiffer v. O. & W. R. & Nav. Co. (Or.), 144 Pac., 763.

The doctrine of comparative negligence and apportionment of damages does not apply where the injured person's own negligence was the sole cause of the injury.

Railroad v. Auchinachie, (Ga.), 83 S. E., 127.

In the present case the question of proximate cause is an important factor, and yet the trial court nowhere defines the term. The jury is left to determine for itself the meaning of this technical term and to apply it to the facts as they were found to be. This omission is important particularly in view of the instruction that defendant's negligence must be found to be the proximate cause of the injury sustained by plaintiff before liability would be incurred. The trial Court gave the following instruction on the issue of negligence:

> "If the jury find from the evidence that the defendant negligently delivered to the plaintiff an order that his train No. 84 should meet train No. 81 at a station, Grandy, and negligently gave to the conductor of train No. 81 an order to meet train No. 84 at Granite, and that this negligence on the part of the defendant was the proximate cause of the plaintiff's injury, and is established by the greater weight of the evidence, you will answer the first issue 'Yes.'" (Printed record, page 98.)

The charge does not contain a more definite reference to proximate cause than appears in this instruction.

Was plaintiff's negligence the sole cause of the collision? We contend that upon facts of this case, this is a question for the jury. If the defendant could not have reasonably foreseen that the giving an order of a doubtful character would

likely result in injury to some one, then such act was not the proximate cause of the injury sustained by plaintiff. "Reasonable foresight" of harm is an essential ingredient of actionable negligence.

> "A finding that negligence, or an act amounting to wanton wrong, is the proximate cause of an injury, is not warranted, unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."
>
> *Milwaukee & St. P. Ry. Co. v. Kellogg,* 94 U. S., 469.
>
> *Atchison, T. & S. F. Ry. Co. v. Calhoun,* 213 U. S., 1.

It is necessary in order to create liability under the Federal Employers' Liability Act that there shall be *negligence* on the part of the carrier. The carrier is not an insurer of the safety of the employee.

Seaboard Air Line Ry. v. Horton, supra.

If there is an intervening cause which produces a result out of the natural course of events, the prior conduct of the defendant does not become a *cause* in the sense of creating liability for the resulting injury.

Union Pac. R. Co. v. Callaghan, 56 F., 988.

Could the defendant reasonably foresee that plaintiff would disregard its rules and run past a station when he was in doubt as to whether it was the meeting point of his train with a train running in the opposite direction? The rules were intended to cover the very situation that might be created by a doubtful order. If no situation of danger were created, it would be useless to direct the employee to pursue the safe course and run no risk. The order given plaintiff, if conceded to be of a doubtful character, when read in the light of the defendant's rules, did not direct him to proceed to *Grandy,*

but directed him to stop at *Granite* and determine whether that was the correct meeting point for his train with train No. 81.

> "Viewed with reference to the test of anticipation or non-anticipation, the essential significance of the doctrine as to contributory negligence is that such negligence is never a contingency which the master is bound to take into account or look forward to as a possibility to be provided against. Hence, the legal connection between the wrongful act and the injury is invariably deemed to have been broken whenever the evidence shows that the negligence of the injured servant himself was the efficient cause of the injury."
>
> 2 Labatt on Master and Servant (1st Ed.), Sec. 810.

The last conscious agent in producing the injury is the party liable for it.

> 1 Bevan, Negligence (3rd Ed.), 53.
>
> "If the result was not within the ken of reasonable prudence and foresight, then proximate cause is not established."
>
> *Larson v. Nassau & Erie R. Co.*, 151 N. Y. Supp., 694.

We submit that the defendant was entitled to an instruction that if plaintiff's negligence was the *sole proximate cause of the injury*, he would not be entitled to recover damages.

The instruction requested and refused, that if the collision was caused by failure of plaintiff to observe the defendant's rules, the issue of negligence should be answered "No" is fully supported by the evidence and by authority.

> *Whitson v. Wrenn*, 134 N. C., 86.
> *Stewart v. Carpet Co.*, 138 N. C., 60.
> *Holland v. Seaboard A. L. Ry.*, 143 N. C., 435.

Respectfully submitted,

MURRAY ALLEN,

Attorney for Plaintiff in Error.

RALE'GH, N. C., March 11, 1915.